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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-766

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,

v.

RUSH PETTWAY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

The Petitioner, American Cast Iron Pipe Company ("ACIPCO", or the "company"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 24, 1978.

OPINIONS BELOW

The opinions of the District Court for the Northern District of Alabama are not reported, but are set forth in the Appendix as follows: (1) Decree entered May 14, 1975 (App. 1); (2)

Judgment entered June 12, 1975 (App. 41); and (3) Final Order and Modified Judgment entered November 20, 1975 (App. 47). The opinion of the Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix (App. 57).

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1978 (App. 57). Timely petitions for rehearing and rehearing *en banc* were denied on September 11, 1978. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

This employment discrimination class action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.*, and under 42 U.S.C. § 1981, against a substantial manufacturing company employing approximately 3,300 employees in 13 production and maintenance departments. The questions presented are:

1

May a Court of Appeals properly require, *sua sponte*, a District Court immediately on remand to enter injunctive relief

[1] Petitioner desires to preserve a fifth and sixth question for argument if this petition is granted, as follows: (5) Does the decision below conflict with this Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), by improperly precluding the District Court from exercising its discretion over the award of back pay consonant with the statutory objectives of the back pay remedy, to compensate discriminatees and to insure future compliance with the Act? (6) Does the decision below conflict with this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), by improperly affording class members injunctive relief and back pay eligibility without finding that any individual class member was a potential victim of unlawful discrimination?

not sought by plaintiffs in the District Court, making extensive alterations in the employer's operating procedures, including the abolition of its promotion and transfer system, without any evidence having been adduced in the District Court—before or after the remand—directed to the necessity, fairness, and workability of that relief?

2

Does the promotion by an employer of its employees on the basis of their relative qualifications (i.e., promotion of the best qualified employee), without regard to race, constitute unlawful discrimination?

3

Are releases of claims under employment discrimination laws, executed by 399 class members in exchange for almost a half million dollars of back pay received by them, properly invalidated by a Court of Appeals without any attempted showing by the releasors that the releases were not voluntarily and knowingly executed?

4

Does the decision below conflict with the procedure set forth by this Court governing application of the "business necessity" doctrine, by (a) precluding employers from preserving "job related" employment practices neutrally applied yet found to perpetuate past discrimination, unless they can be shown to be "essential" to safety and efficiency, by (b) omitting consideration of whether any alternative practices exist that are equally safe and efficient, and by (c) relieving the plaintiffs of any burden to prove that such satisfactory alternative practices exist?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the due process clause of the fifth amendment to the United States Constitution, U.S.C.A. Const. Amend 5. The statutory provisions involved are 42 U.S.C. §§2000e-2(a), 2(h), and 5(g). These provisions are reproduced in the Appendix (App. 191).

STATEMENT OF THE CASE

A

The Facts

Petitioner is a manufacturing company with its principal complex in Birmingham, Alabama, consisting of six primary production departments,[2] three maintenance supporting departments,[3] three material supporting departments,[4] and the inspection department.[5]

[2] The production departments are: (1) The *Monocast Department*, which contains three producing units for the production of cast iron and ductile iron pipe. The major process used in the department is centrifugal iron casting in rotating molds, although two casting processes and two different annealing processes are used. (2) The *Fittings Foundry* which produces between 35,000 to 40,000 different accessories to complement the pipe produced in the pipe shops. The major process used is static casting in green sand molds compacted by three different processes. (3) The *Steel Foundry*, which produces steel tubes and casting of various alloys and shapes. The major process used is centrifugal steel casting by ceramic mold casting techniques. (4) The *Melting Department*, which melts all of the hot metal required by the Monocast Department, the Fittings Foundry, and Steel Foundry, uses three different melting processes, cupola melting with electric furnace adjustment and pressure treating, electric induction melting with pressure treating, and electric arc melting. The department also produces mag coke alloy for ductile iron and melts and casts brass parts for valves and hydrants. (5) The *Steel Pipe Mill*, which produces steel pipe from steel skelp, accomplished basically by uncoiling, forming, and continuous welding of the skelp into steel pipe. (6) The *Machine Shop*, which performs all of the machining required on items produced in Steel Foundry, Fittings Foundry, and Monocast, as well as producing replacement parts required in maintenance operations and valve assembly. Machine Shop operations require precision finish machining of steel products, polishing, honing, dynamic balancing, and fabrication.

Several of petitioner's production departments are larger than the plants of most comparable manufacturing companies. The 13 P & M departments are spread out over 100 acres in separate buildings. Each department requires different skills and utilizes different production or support processes and techniques.

Petitioner employs approximately 3300 employees, of whom approximately 27% are black. Most of the employees have never worked in more than one of petitioner's departments and have never been inside some of petitioner's departments (several being over ¼ mile apart).

B

The District Court's 1972 Decision

This employment discrimination class action suit was filed on May 13, 1966, under the provisions of Title VII of the

[3] The maintenance supporting departments are: (1) The *Mechanical Maintenance* department, which maintains numerous machines throughout the plants and performs plumbing and installation of machines. (2) The *Electrical* department, which performs electrical and electronic repair, installation services, motor repair, and operates the power house. (3) The *Construction* department, which performs carpentry, concrete, brickmason, tinsmith, paint and scale mechanic work.

[4] The material supporting departments are: (1) The *General Yards* department, which unloads stores, and distributes bulk materials, removes refuse, and maintains railroad tracks and roads. (2) The *Shipping* department, which performs product storage, gathering, shipping, and billing functions. (3) The *Central Stores* department, which orders, receives, distributes, and accounts for supplies and spare parts.

[5] The *Inspection* department performs all final and some intermediate inspections in all producing departments and is responsible for monitoring and insuring final product quality.

Civil Rights Act of 1964, 42 U.S.C.A. §2000e *et seq.*, and 42 U.S.C.A. §1981. After a prior appeal to the Fifth Circuit on procedural grounds, *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969), and an appeal from the discharge of one of the named plaintiffs, *Pettway and Wrenn v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969), the class action charges were tried in October, 1971.

After the trial, the District Court found, *inter alia*, that: (1) the company had made a good faith effort to comply with all federal equal employment opportunity laws and regulations;[6] (2) the company's departmental seniority system was applied neutrally to all employees, was justified by business necessity, and did not perpetuate past discrimination;[7] (3) the company's lines of progression ("LOP's") within each department[8] were applied neutrally and were justified by business necessity, the jobs in each LOP being functionally related to the other jobs within the LOP and affording training and experience necessary to advance and perform proficiently the higher-rated jobs; (4) the company's testing program was illegal and resulted in post-Act discrimination, but was not enjoined since all testing

[6] The District Court found that the company had endeavored to hire the hard core unemployed, had applied its employment practices equally to black and white employees, and had extended its testing program (found to be illegal by the District Court) to black employees only on the advice of a representative of the Office of Federal Contract Compliance, who stated that white and black employees would have to be treated alike with respect to testing and other hiring and promotion qualifications.

[7] In support of the finding that the departmental seniority system did not perpetuate past discrimination, the District Court relied upon evidence showing that older blacks were generally not qualified to perform more precise higher-paying jobs in other departments, that blacks had refused promotions, requested demotions, declined training opportunities, and failed or refused to bid on higher-paying jobs, thus "voluntarily freezing themselves" into lower-paying jobs.

[8] Each department is organized into one or more LOP's into which employees can enter and move up into more demanding jobs as vacancies occur, on the basis of seniority, ability, and experience.

had been discontinued before trial; and (5) the class was not entitled to back pay due to the good faith efforts of the company to comply with equal employment laws and regulations and because a back pay award was not necessary to insure future compliance therewith. *Pettway v. American Cast Iron Pipe Company*, 7 FEP Cases 1010 (N.D. Ala. 1972).

C

The Court of Appeals' 1974 Decision

On appeal, the Fifth Circuit reversed the District Court's decision, holding, *inter alia*, that: (1) the company had engaged in pre-Act discrimination in the assignment of blacks to lower-paying, non-skill departments; (2) the company had maintained illegal testing and educational requirements (for hiring, promotion and transfer) from 1964 to 1971; (3) the departmental seniority system, although applied neutrally, had the effect of perpetuating the effects of past discrimination; (4) the District Court should issue an injunction on remand requiring, *inter alia*, plant-wide posting of all vacancies and transfer of qualified personnel to such vacancies based on plant-wide seniority, subject to the company's right to demonstrate that the LOP's were justified by business necessity; and (5) good faith and lack of necessity to insure future compliance with EEO laws were insufficient bases to support a denial of back pay. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974).

D

The Proceedings in the District Court on Remand

On remand in June of 1974, at the direction of the District Court, the parties engaged in an intensive and lengthy effort—joined in actively by the District Court—to resolve by consent

the remaining issues involved in this case. The effort included numerous conferences between counsel and with the District Court, exchanges of evidence, and consideration of proposals, counterproposals and objections by the parties and by the District Court. The substance of these proceedings was described in a lengthy Stipulation of the Parties signed by Mr. Adams (counsel of record for the plaintiff class), and petitioner's counsel (see *infra*).

The parties were unable to reach an agreement concerning the injunctive relief or the back pay, and the District Court, on the basis of the informal proceedings just described, including a computer printout which showed a marked improvement in black promotions and transfers,[9] entered on May 14, 1975, its Decree (the "May Decree"), which, *inter alia*, (1) revised the company's LOP's extensively to assure job-relatedness between lower and higher-paying jobs therein, removing pre-entry base group jobs therefrom and establishing advance entry jobs, job boxing and job connecting with the effect of job skipping (*See* App. 116-17); (2) modified its seniority rules by replacing departmental seniority with plant seniority with certain safeguards to insure the retention of essential qualifications; (3) provided rate retention for eligible blacks, enabling them to transfer into other departments without loss of pay; (4) provided for a grievance procedure and an implementation committee; and (5) directed the company to make back

[9] The Printout of February 20, 1975 showed, *inter alia*, that: (1) the number of blacks employed in pay groups 9-17 (the higher-paying pay groups) increased by 24.2% from 1971 to 1975, whereas the number of whites in those pay groups decreased by 3%; (2) the number of blacks in pay groups 0-8 (the lower-paying pay groups) decreased by 3% in the same period, whereas the number of whites in those pay groups increased by 13%; and (3) the number of blacks employed in four of the departments found to be "predominantly white" by the Court of Appeals increased dramatically (e.g., in the Machine Shop, blacks increased by 25% from 1971 to 1975, while whites decreased by 4%; in Inspection, blacks increased by 1400% while whites increased by only 26%; in Steel Pipe, blacks increased by 2400% while whites increased by 186%).

pay calculations in accordance with specific instructions contained in that decree, including instructions pertaining to the definition of the eligible back pay subclass.[10]

The back pay directive contained in the May Decree was made after the District Court realized that efforts to settle the back pay issue[11] had failed. The District Court thereupon made the back pay determination itself after consideration of the contentions of the parties and by directing that several modifications be made to the back pay calculation plan developed by the company during the settlement stage.[12] On June 12, 1975, the District Court entered its final judgment (the "June Judgment") awarding back pay totalling $1,000,000 to

[10] Basically, the District Court ordered that only employees hired before July 2, 1965, who were as of the time of the Decree actively working for the Company, or who, after July 2, 1965, left the employment of the Company with at least one year of Company service, should be included in the back pay calculations (App. 13). The Court found that "no black employee employed *subsequent to* July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any other alleged discriminatory practice" (App. 50) (emphasis added).

[11] In February, 1975, the company suggested a back pay calculation plan (the "Simplified Plan") and, based upon the plan, ultimately made a final offer to settle the back pay issue for $560,000 which it deemed excessive in view of the lack of qualifications and promotional opportunities declined by certain class members whom the company deemed should be excluded from the back pay award altogether. Plaintiffs rejected the offer, refusing to abandon their comparability approach, which advocates the calculation of back pay based upon the difference between the gross earnings of a black and a white with comparable seniority—regardless of other factors such as qualifications, ability, and voluntary freezing; and the company would not abandon its (a) individual-proof-of-claims' approach, whereby each affected class member would be required to file a claim and prove his entitlement to a specific amount of back pay, or, in the alternative, its (b) final offer of $560,000 based upon its Simplified Plan.

[12] The District Court directed the company to modify its Simplified Plan (see n. 11, *supra*) by (1) extending the back pay period, (2) including certain additional employees in the back pay class, (3) taking into account the average bonus paid to employees over

841 class members, denying back pay to the remaining 1401 class members, and making further modifications to the LOP's (App. 41).

In all of the proceedings referred to above, the law firm of Adams, Baker and Clemon, in association with Jack Greenberg and other attorneys of the NAACP Legal Defense Fund, Inc., served as the counsel of record for the plaintiff class. Mr. Adams stated that although the May Decree and June Judgment did not contain every provision sought by Plaintiffs, they "constituted . . . good decree[s]" and "[s]hould be given an opportunity to work" and "if they did not work" plaintiffs' lead counsel, who then had over 27 years experience in civil rights litigation, "was prepared to come back to the Court for additional relief to make them work. . . ."

No motion or request for a trial of the case was made by Mr. Adams, his firm, or his associate counsel, or by counsel for the company, at any time after the remand.[13] Nor did the District Court set the case down for trial on the merits at any time after the remand.

On June 20, 1975, post-judgment objections to and a motion for reconsideration of the May Decree and June Judgment were filed pro se by 661 class members, of whom 147 had cashed their back pay checks and signed the requisite release of claims.

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the 9½-year back pay period, and (4) extending the interest period. These adjustments raised the total award to slightly less than $1,000,000, which the Court rounded off to that figure. The Court then devised its own method of allocating the gross award, after finding that the company's method produced widely disparate results.

[13] Mr. Adams supported several of the objections that he made to the proposed decrees (the first such objections having been filed in August, 1974) by pointing to the fact that no evidence was in the record to support various aspects of the proposed decrees. The parties were engaged in settlement negotiations at the time, however, and after such negotiations failed, no formal motion was made by Mr. Adams for a trial of the case. As stated above, Mr. Adams considered the decrees to be good decrees and expressly declined to take any appeal from the same.

Soon thereafter, several other post-judgment pleadings were filed purportedly on behalf of the plaintiff class by new counsel, Mr. Robert L. Wiggins, including motions to present additional evidence and to substitute Mr. Wiggins' firm as counsel for the plaintiff class in lieu of Mr. Adams' firm and associate counsel.

After two hearings,[14] the District Court (1) denied the post-judgment motion for substitution of counsel but permitted Mr. Wiggins' firm to represent the disaffected employees as amicus curiae; and (2) entered its Final Order of November 20, 1975 (the "Final Order"), which modified the June Judgment so that any back pay award not accepted by December 15, 1975, would be set aside and annulled, and afforded any non-accepting back pay awardees the right to pursue their individual back pay claims independently, free of res judicata or collateral estoppel defenses. The Final Order also overruled all of the remaining post-judgment motions (App. 47).

On December 4 and 19, 1975, notices of appeal were filed by 480 class members, of whom 35 had accepted their back pay awards and executed releases of claims.[15]

E

The Decision Below

On appeal, the Court of Appeals first determined that the injunctive relief award and the definition of the back pay subclass were accomplished by the District Court as its own judgment, whereas the determination of the back pay award was accomplished by consent of the parties.

In evaluating appellants' challenges to the injunctive relief, the Court of Appeals described its "fundamental problem" as

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[14] At the second hearing, the Stipulation of the Parties referred to above was read into the record for the purpose of explaining to class members how the May Decree and June Judgment were arrived at.

[15] A total of 399 class members cashed their back pay checks totalling almost $500,000 and signed the requisite release of claims.

the "absence of an adequately developed factual record" (App. 110). The Court emphasized that it did not criticize the District Court for attempting to resolve the dispute by informal conciliation procedures (App. 108, 110), but stated that when it became clear that settlement negotiations would not bear fruit, "it was incumbent on the court to base its conclusions on evidence in the record" (App. 110).

In response to the company's contention that the District Court considered ample evidence in chambers which supported its findings, the Court of Appeals acknowledged that the "learned and experienced" district judge may have "conscientiously, logically and intelligently" concluded that his judgment was correct, and that "[t]here may have been rivers of evidence coursing through the chambers of the district judge" (App. 110). But the Court of Appeals concluded that without evidence available to it on the record, it was unable to "gauge the depth of those rivers or assess their navigability as a route to the district judge's conclusions" (*id.*).

Recapitulating its findings in its 1974 decision that class members were generally concentrated in the less desirable departments, the Court of Appeals found that the injunctive relief fashioned by the District Court, although improving the transfer and promotional opportunities of class members, nonetheless "[fell] short of the rightful place goal" (App. 128). The central fault with the injunctive relief was the "initial preference" given to LOP employees for job vacancies within the LOP.[16]

[16] Under the May Decree, whenever a job vacancy occurs within an LOP, the job is offered first to employees within the same LOP (typically to the senior incumbent in the job immediately below the vacant job). If the vacancy is not filled by an employee within the LOP, it is posted for bidding plant-wide, based upon plant-wide seniority. The basis for this "initial preference" to LOP employees was the District Court's finding that experience within the lower level LOP jobs is necessary to the safe and efficient operation of higher jobs in the LOP.

Citing the "well-established principle" that a promotion and transfer system which impedes the attainment by class members of their "rightful place" within the company "must be justified by business necessity" (App. 132), and reiterating the "heavy burden" placed on the defendant to prove that such "structural impediments are essential to the goals of plant safety and efficiency (*Id.*), the Court of Appeals overturned the District Court's finding that the LOP's in the departments designated as "noncraft" by the Fifth Circuit were based upon business necessity, holding that the finding was "unsupported by the record" (App. 138). In support of its holding, the Court of Appeals pointed to the (undisputed) fact that no new hearings were held and no additional evidence[17] was introduced into the record, and that the District Court improperly relied upon the record of the 1971 trial in support of its findings of business necessity.

Instead of remanding the LOP issue to the District Court for a trial on the merits, however, the Court of Appeals stated that:

> ACIPCO has now had two opportunities to demonstrate business necessity for lines of progression in the noncraft departments. It has failed both times to satisfy its burden of submitting competent evidence on the record that these lines of progression are functionally related. We cannot allow the vindication of the statutory rights of black employees to await yet another proceeding below and a possible third appeal to this court. The time has come for definite, if preliminary, action. (App. 140).

The Court of Appeals thereupon ordered the District Court on remand to enter an "interim order" providing for plant-wide bidding based on plant seniority on all vacancies in those departments designated "non-craft" by the Court of Appeals,[18]

[17] Except for the Stipulation of the Parties described above.

[18] The company has no designation of its departments as "craft" or "noncraft". The departments designated as "noncraft" by the Court of Appeals contain approximately one-half of the company's craft jobs. See Section I(c)(7), *infra*.

limited only by objective standards for measuring qualifications to be devised by the company. Under the order, petitioner is expressly forbidden to promote its employees on the basis of their relative qualifications,[19] although there had been no finding in any decision rendered in the 12-year history of this case that the company's practice of promoting on the basis of relative qualifications was discriminatory.

The interim order was directed to be entered without any prior hearing in the District Court. Only if the District Court "at its discretion" saw fit would the company be given a "final opportunity" to prove business necessity for its non-craft LOP's (App. 142).

The Court of Appeals also reversed in part and affirmed in part other portions of the injunctive relief awarded by the District Court.[20]

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[19] I.e., the company cannot promote its best qualified employees to fill job vacancies. Promotions are to be based under the interim order on plant seniority initially. The company may then reject the senior bidder only if he fails to meet a "threshold level" of qualifications (App. 141 n.48).

[20] (1) *Rate Retention On Transfer* ("red circling"). (a) The limitation on the red circling remedy to class members employed prior to February 18, 1968, was affirmed (App. 145). (b) The ceiling placed on the retention rate (of Pay Group 8) was removed, and the District Court was required to provide full red circling for eligible class members without further hearing on the issue (App. 146). (c) The limitation of the red circling rights to transfers made within three years of the decree was reversed (App. 147). (d) The provision terminating the retained rate where the transferee voluntarily freezes in the new line or where 104 weeks have elapsed since the transfer was affirmed as to the voluntary freezing portion but reversed and remanded as to the 104-week limitation (App. 148). (2) *Supervisory Positions.* The District Court's findings pertaining to the method of selecting supervisors were reversed and the issue was remanded (App. 151). (3) *Reduction in Workforce and Recall Provisions.* (a) The provision that layoffs will be made in descending job sequence order in each LOP based on plant seniority was affirmed (App. 153). (b) The provision that recalls after layoffs are to be made in the reverse order of layoffs was reversed, and the Court of Appeals ordered that after layoffs, less senior whites would lose their entitlement to their former jobs in favor of senior blacks (App. 154). This order was made without reference to any evidence in the record and without providing for a hearing on remand. (4) *Apprenticeship Program.* (a) The age limitation on apprenticeship applicants was reversed in part, and the District Court was ordered to modify its order accordingly, without any prior hearing on remand (App. 157). (b) The District Court was also directed to reconsider the length of the apprenticeship period. (5) *On-the-Job Training.* This portion of the District Court's decree was remanded for detailed findings concerning the operation of the on-the-job training program (App. 162).

The reasons given by the Court of Appeals for its rulings just described varied widely, including the *plaintiffs'* failure to demonstrate on the record sufficient facts in support of certain of their arguments (App. 145 & 147), the lack of sufficient evidence on the record—without stating whose burden it was for the same (App. 148, 151, 153)—and the company's failure to show business necessity for certain items (*e.g.*, App. 159). Also widely divergent was the disposition of these issues by the Fifth Circuit, including the outright imposition of a remedy without a remand (App. 147, 154 & 157) and the remand of other issues to the District Court for further hearings (*e.g.*, App. 162).

Concerning the definition of the back pay subclass, the Court of Appeals held that it was unable to determine from the record whether the District Court properly concluded that class members employed subsequent to July 2, 1965 had not suffered any economic loss due to alleged discrimination (App. 164). The District Court's denial of back pay to the subclass was vacated and remanded for a trial.

After having characterized the back pay award as a consent settlement, the Court of Appeals held that the District Court abused its discretion in approving the settlement in view of the widespread dissent to the award (App. 176).

In addition to invalidating the settlement, however, the Court of Appeals held that the 339 awardees who cashed their back pay checks and executed releases of claims were nonetheless entitled to "reject their awards and participate in further back pay proceedings" (App. 186).[21] Earlier in its opinion,

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[21] No requirement was imposed for the return of accepted back pay as a condition precedent to participating in further back pay proceedings (App. 186).

the Court of Appeals held that these same releasors had standing to maintain the appeal "notwithstanding the fact that the waiver form they signed in cashing their checks *could be construed* as a waiver of their right to appeal" (App. 106) (emphasis added).[22]

The Court of Appeals stayed its mandate on September 21, 1978, pending review by this Court on certiorari.

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[22] No attempt was made by the releasors to invalidate their releases in the District Court, and the Court of Appeals did not address the question of whether the releases were executed voluntarily and knowingly.

II

REASONS FOR GRANTING THE WRIT

This case presents questions of federal law of great importance not only to petitioner but also to the sector of the economy subject to the jurisdiction of federal courts under Title VII. The unprecedented "interim order," which not only makes substantial alterations in petitioner's operating procedures that will be damaging to plant safety and efficiency, but also requires the alterations to be made without any evidence having been adduced in the District Court at any time—prior to or after the remand—directed to the necessity, fairness, or workability of the relief, conflicts with this Court's decision in *Furnco Construction Corp. v. Waters*, — U.S. —, 57 L.Ed. 2d 957 (1978), deprives petitioner of due process of law, improperly usurps the power of the District Court, and exceeds the proper ambit of appellate court equitable jurisdiction. The unprecedented declaration by the Fifth Circuit that petitioner cannot promote employees on the basis of their relative qualifications (i.e., petitioner cannot promote its best qualified employees) conflicts with this Court's opinion in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and potentionally will affect the productivity of a broad sector of the economy. The Fifth Circuit's invalidation of releases executed by 399 class members who cashed back pay checks totalling almost half a million dollars conflicts with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Fifth Circuit's "business necessity" doctrine and the standards it enunciates governing the award of back pay conflict with the standards set forth consistently by this Court.

Under these circumstances, this Court should exercise its powers of supervision to resolve the conflicts that now exist and to relieve petitioner of the manifest injustice of the decision below.

I

The Interim Order

The interim order charts a dangerous new course in enforcement proceedings under employment discrimination laws. It raises questions of critical importance pertaining to (1) the proper disposition of an employment discrimination action by a court of appeals after reversing a district court's findings,[23] and (2) the extent to which and the manner in which a court of appeals may alter employment practices under Title VII.

A. Upon vacating the District Court's decree for lack of a formal trial, the Court of Appeals should have remanded the case for a formal trial.

As stated above, the parties endeavored conscientiously for several months on remand to settle this lawsuit, settlement efforts failed, and the District Court thereupon adjudicated the case based upon the substantial information it had acquired during the settlement stage and the 1971 trial.[24]

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[23] This Section I is directed to the Fifth Circuit's disposition of the promotion and transfer system, which resulted in its imposition of the interim order. The same arguments are intended to apply, however, to that Court's disposition of the remaining injunctive issues without a prior trial. *See* note 20, *supra*.

[24] The District Court's decision to adjudicate the case without a formal trial is, in retrospect, difficult to criticize. It was exhausted from the settlement efforts, neither party had requested a formal trial, and the Court felt that it had already been thoroughly educated concerning the pertinent issues. Even the Fifth Circuit acknowledged that:

> Much of the information *and evidence necessary to frame an adjudicated decree* may be known to the district court through its participation in settlement negotiations . . .
>
> * * * * * * *
>
> Evidentiary hearings and the submission of exhibits into the record may sometimes appear redundant and inefficient from the perspectives of the parties and the district court . . . (App. 109) (emphasis added).

Only at the post-judgment stage, when the various post-judgment motions were filed by dissatisfied class members, could the District Court have second-guessed its decision not to conduct a formal trial. By that time, the sheer inertia of the extensive injunctive relief being implemented and the back pay checks being mailed out was enough to discourage any serious thoughts of scrapping the entire package—especially a package deemed acceptable by counsel of record for both parties.

Under the Fifth Circuit's analysis, the fatal flaw in the District Court's disposition of the case was that it failed to conduct a formal trial after settlement efforts failed. The responsibility for the lack of a trial, under the Fifth Circuit reasoning, was upon the District Court:

> Sometimes, however, settlement efforts do not achieve fruition. In these instances *the trial court* must alter *its* role and adjudicate the dispute among the parties. (App. 109) (emphasis added).

It is this background that makes the stated predicate for the interim order shockingly anomalous and manifestly unfair. In stating that "ACIPCO" has now had two opportunities to demonstrate business necessity for its LOP's and has "failed both times"—as an apparent justification for imposing the interim order—the Fifth Circuit illogically placed the entire blame for

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Besides, the prospect of making the seemingly endless findings envisioned by the Fifth Circuit's 58-page 1974 opinion—including trudging through its renown "quagmire of hypothetical possibilities" in the back pay area—was more than enough to persuade the Senior Judge not to formally transcribe what he already knew. Indeed, after the June Judgment was entered, finally resolving all of the issues in the case, plaintiffs' counsel of record and associate counsel—both firms enjoying impeccable reputations in the discrimination litigation area—advised the class not to appeal because of their belief that the decrees were good decrees and should be given a chance to work.

the lack of a formal trial on petitioner. At the very least it should have divided the blame between all parties—including the plaintiff class whose counsel of record did not seek a formal trial—and simply should have remanded the case for a trial.

B. **By directing the entry of the interim order the Court of Appeals became a far more serious victim than the District Court of the same impropriety of which it criticized the District Court.**

The Court of Appeals' fundamental criticism of the District Court was that it entered an injunctive decree in the absence of a fully-developed evidentiary record.[25] But the question the Fifth Circuit never considered was *how could there be* any formal evidence, sufficient or insufficient, when the case was *never formally tried* on remand?

Instead of remanding the case, however, the Court of Appeals proceeded blithely ahead to direct the entry of an injunctive decree without *any* evidence on the record to support that decree—precisely the same miscreant procedure of which it criticized the District Court.

But in this regard the Court of Appeals outdid the District Court. At least the District Court had the benefit of having tried the case in 1971 and having become thoroughly educated in all aspects of the case during the settlement stage. The Court of Appeals had the benefit of none of the same.

Not only did the Fifth Circuit direct the entry of the interim order (1) without any evidence on the record directed to the workability, safety, and efficiency of that order and (2) without

[25] Repeatedly, the Court of Appeals vacated various aspects of the District Court's decree because of "insufficient evidence on the record" or because the "evidence did not support" the decision or because there was "no evidence adduced" pertaining to the particular matter.

the benefit of the information gained by the District Court on remand, but—and far more seriously—it directed the entry of that order (3) in disregard of the findings of the District Court that the existing system (the LOP-based promotion and transfer system) was necessary for the safe and efficient operation of petitioner's plant.[26] Ironically, however, the Fifth Circuit *acknowledged* that such findings by the District Court could have been supported by substantial evidence and intelligently made (App. 110). By abolishing the present system, therefore, the Fifth Circuit gambled in an evidentiary vacuum with the safety and efficiency of petitioner's plant. That Court had to realize that if such evidence did exist—proving that the present system is necessary for the safety and efficiency of the plant—then the interim order would *directly foster* dangerous and inefficient working conditions at petitioner's plant. Petitioner adamantly contends that such evidence does exist and that the interim order is unworkable, unsafe, and inefficient.

C

The interim order is unworkable and potentially dangerous.

Petitioner feels compelled to summarize briefly the practical problems created by the interim order, realizing that these have not been subjected to cross-examination at trial, considered by the District Court, or reviewed by the Court of Appeals. The summary action of the Court of Appeals, however, has short-

[26] To compound matters further, the Fifth Circuit ignored the fact that the District Court's decree was modeled after decrees implementing virtually identical LOP-based promotion and transfer systems approved by the same Fifth Circuit. *E.g., United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975) (virtually identical LOP-based system approved for application to some 250 plants in the steel industry); *United States v. H. K. Porter*, 491 F.2d 1105 (5th Cir.) (virtually identical LOP-based system entered at Fifth Circuit's direction by the same District Judge who decided the instant case at 7 FEP Cases 1021 (N.D. Ala. 1974)).

circuited these two stages from the federal system of trial and review, and it is of critical importance to petitioner that the severity of the problems be appreciated by this Court.

1. **The Drastic Nature of the Change—In General.** Under the District Court's decree, vacancies within an LOP are first filled by employees within the LOP (usually in the next-lower job within the LOP). Resulting vacancies are also filled within the LOP. This system, often referred to as the "team concept", assures the company of better qualified personnel in its LOP's.[27] Experience has proven that the employees already working within the LOP should be given the first opportunity to fill job vacancies in the LOP (and resulting vacancies) and that only the relatively less-skilled entry-level jobs should be filled by a stranger to the LOP. Under the interim order, however, *all* vacancies in LOP's located in the "non-craft" departments are to be filled by plant-wide bidding based on plant

[27] Years of experience has proven that employees who have worked together on certain machines (usually different from any other machines in the plant), who have dealt with their LOP's problems over a substantial period of time, and who have learned the productive functions accomplished by their LOP, are able to perform the various LOP jobs with a higher degree of efficiency and safety. When vacancies occur within the LOP, the employees who have worked in the LOP are possessed with a valuable familiarity of the vacant job and know-how which usually makes them by far the best qualified to perform the vacant job. The necessity of LOP's in similar manufacturing plants has long been acknowledged, *e.g., Whitfield v. United Steelworkers,* 156 F.Supp. 403, 435 (S.D. Tex. 1957), *aff'd,* 263 F.2d 546 (5th Cir.), *cert. denied,* 360 U.S. 902 (1959) ("Efficient and prudent operations require the progression and promotional system that is carried out in the Lines of Progression"); *United States v. United States Steel Corp.,* 371 F. Supp. 1045, 1056 n.27 (N.D. Ala. 1973), *rev'd on other grds,* 520 F.2d 1043 (5th Cir. 1975) (court found based upon the evidence that business necessity had been shown for the "basic principle involved in the line of promotion concept."); *Taylor v. Armco Steel Corp.,* 373 F. Supp. 885, 910 (S.D. Tex. 1973) ("The LOP's promote safety and efficiency by insuring job related training and job familiarity. While other configurations of the jobs and lines can no doubt be arranged, the line concept itself is a valid one, reasonably related to legitimate business purposes and 'essential' to their attainment.").

seniority. Senior bidders will typically be less-skilled employees from wholly different departments—and they will typically be bidding on jobs involving entirely new machines and processes, and requiring much higher skills and experience that only having worked in the LOP for a substantial period of time can provide. More importantly, however, the interim order reveals that the Fifth Circuit was unaware of the necessity of the LOP's themselves, as an integral part of a productive process (see Sections 2, 3, 4, 5, and 8, *infra*). Obviously concerned only with the functional-relatedness of jobs *within* each LOP, the Fifth Circuit never thought to ascertain the function of the LOP-based system itself. In short, the interim order attempts to make a seriously disruptive, major alteration in the productive process utilized by the company. LOP's in "non-craft" departments are totally abolished under that order and a completely new system—heretofore untried and untested—is required to be imposed.

2. **The Multiplier Effect.** Under the interim order, when a vacancy is bid, the supervisor will receive a list of bidders from numerous other departments, and after several days of paperwork and harried effort to ascertain the experience and capabilities of the bidders, followed by several meetings between supervisors to investigate and evaluate the relative qualifications of the bidders, the vacancy will be awarded to the successful bidder who will transfer from, say, department "X". That will automatically create a vacancy in department "X". Then the same bidding and investigative procedure will have to be repeated to fill that vacancy. After the department "X" vacancy is filled, another vacancy in department "Y" will be created. The procedure will again have to be repeated. The interim order will transform what has been an efficient and routine procedure for filling vacancies into a major brushfire spread automatically by the wind each time it was thought to have expired.

3. **Inability to Add Shifts in Time to Meet Increased Product Demand.** One of ACIPCO's competitive advantages has been its ability to add shifts of employees quickly and thereby increase production in response to rapid demand increases.[28] This advantage has been made possible by the flexibility afforded by the LOP's. Progression lines provide clearly-understood paths for the expansion of trained manpower in minimum time. Under the interim order, it would take weeeks to evaluate and select bidders from departments all over the plant. Training of an entire LOP of strangers would require months. The same chain of vacancies throughout the plant discussed above would result—on a much larger scale. In short, under the interim order, the company could not commit to the type of rapid production increases which are necessary to obtain important orders. Its competitive advantage would be lost.

4. **Inefficiency in Shift Reductions.** As with most substantial manufacturing companies, ACIPCO experiences shift reductions in periods of recession and low demand. Under the District Court's decree, the company cuts back from two to one shift, for instance, by cutting back employees in descending job sequence order in each LOP, based on plant seniority (App. 2). Employees bump down the LOP until they reach a job on which they are most senior. Having progressed up the same jobs in the LOP, the employees are well qualified to perform any lower-level job in the LOP. Under the interim order, an employee might transfer into a strange new LOP with minimum qualifications and finally be taught to perform his job. But when a reduction in force occurs, he will not have performed and will not know how to perform the lower-level job(s) in the LOP. To what job will he transfer? The interim order does not say. Shift reductions occur in lean times when costs are

[28] As a direct result of this flexibility and responsiveness, petitioner has been able to compete successfully with foreign producers and has received several large export orders (to oil-producing countries in the Middle East).

competitive. Petitioner must have well-trained, highly-productive employees to weather recessions. It should not be required to lose its better-qualified employees and have to rely on less-qualified trainees when economic conditions sour.

5. **Inability to Fill Vacancies With Employees Known to Be Qualified.** Under the LOP system, promotions up the progression line to fill vacancies are not automatic. The foreman has observed each employee in the LOP at work[29] for a substantial period of time, and it is his responsibility to insure that no employee stepping up is unqualified to perform his job. Under the interim order, when vacancies are posted, a foreman will be faced with a list of bidders who not only are strangers to him, but whose work performance he has not observed and whose qualifications he does not know. The foreman will not be able to be sure or even relatively sure that any bidder will be able to perform the vacant job, and could never be held accountable for having placed an incompetent employee on a job. The result will be an inability to fill job vacancies with employees known to be qualified.

6. **Destruction of Trainee Program.** Perhaps the best opportunity for black advancement into the highest-paying jobs in the plant is the trainee program,[30] which requires advancement through designated LOP jobs for the acquisition of the skills and training needed for craft rating. With all vacancies

[29] Typically, employees within the LOP prepare themselves for anticipated promotional opportunities by acquiring training on higher jobs in the LOP, usually by filling temporary vacancies on the jobs.

[30] The company has two training methods by which employees can become craftsmen (the highest-rated P & M jobs in the plant), the apprenticeship program and the trainee program. Of the 41 blacks on craft jobs, 25 reached craft status through the trainee program and 16 through the apprenticeship program. This program is especially well-suited for employees (black and white) who are beyond apprentice age and who are unable to keep pace with ICS lessons and the faster training provided under the apprenticeship program.

subject to plant bidding, however, blacks in trainee progression jobs will be impeded repeatedly when the higher jobs required for craft training are filled by senior bidders—black and white. Furthermore, the employees who bid into those intermediate jobs, being typically senior employees, will be less likely to want to progress to craft status. Thus, not only will there be fewer opportunities for blacks to become craftsmen, but the company's ability to obtain experienced craftsmen will be compromised.

7. **Administrative Anomaly.** Under the interim order, four of petitioner's departments were characterized as "craft and technical" departments, which will retain their LOP's. In nine departments labeled as "non-craft," the LOP's will be abolished and all vacancies will be filled by plant wide bidding (App. 139-140 & n.45). What the Fifth Circuit failed to realize, however, is that: (1) Although the overall skill levels are higher in the departments characterized as "craft and technical," neither departments nor LOP's are properly classified as "craft" or "non-craft". Approximately one-half of petitioner's craft jobs are located in the "non-craft" departments.[31] LOP's are rarely filled exclusively by craft jobs; almost every LOP (in "craft" and "non-craft" departments) that contains a craft job will contain only one or two such jobs.[32] (2) The

[31] If the Fifth Circuit intended to classify petitioner's departments based on the existence of craft jobs within the department, therefore, it misclassified as "non-craft", five departments which contain LOP's with one or more craft jobs. The construction department, for instance, which received the "non-craft" label, is a major craft department in the sense that it contains craftsmen from five different crafts (carpenters, brickmasons, tinsmiths, painters, and scale mechanics).

[32] The skill levels in the LOP's do not jump from "unskilled" to "craft". The skill levels in each LOP vary in fairly even gradations from relatively low in the entry-level jobs to high in the top craft jobs. There are numerous jobs in each department that, while not classified as craft jobs, require high levels of skill, are specialized, and are critical to operational efficiency and product quality. These jobs are designated as "critical" jobs in the LOP's.

presence of numerous craftsmen in "non-craft" department LOP's creates several anomalies in the operation of the various provisions of the interim order, such as the layoff and transfer provisions.[33] The interim order creates an irreconcilable dual system calling for one promotion system (using LOP's) in 4 departments and another system (using plant-wide bidding) in 9 departments, with craftsmen caught squarely in the middle. Due to its conceptual infirmities, the interim order would be extremely difficult to administer,[34] especially in the craft area which is of vital importance to petitioner's productive efficiency.

8. **Loss and Dispersion of Valuable Skills.** Petitioner has an important interest in maintaining high skill levels in each LOP. The training and experience gained by employees in an LOP are invaluable in terms of performing higher-rated jobs within the LOP. Under the interim order, random job-hopping will occur between LOP's. Always interested in greener pastures, employees—both white and black—will transfer to intermediate jobs in unrelated LOP's. That will result in an absolute loss to the company of (1) the transferee's accumulated skills in his old LOP, and (2) the skills of the incumbent in the

[33] Surely a vacancy in a craft job should not be subject to plant-wide bidding based on plant seniority simply because it is in a "non-craft" department. Such a result would allow employees to attempt to bypass the apprenticeship and trainee programs to fill craft jobs that even the Fifth Circuit acknowledged were highly-skilled and inappropriate for plant-wide bidding. Likewise, craftsmen in "non-craft" department LOP's should not be laid off ahead of non-craftsmen possessing more plant seniority, nor should they be bumped by senior non-craft blacks on recalls from layoffs. Logically, craftsmen should not be treated differently merely because they work in separate departments, one labeled "craft" and the other "non-craft".

[34] By comparison, implementation of the District Court's injunctive relief, which was infinitely less complex and which provided detailed policies and procedures explaining a wide range of situations, required several training sessions with over 300 supervisors and countless telephone conversations, meetings, and conferences by all levels of management.

transferee's new LOP who was better qualified than the transferee to fill the vacancy.

9. **Increased Hazard to Employee Safety.** Allowing strangers from remote departments to transfer by plant-wide bidding into intermediate jobs in different departments to work around moving machinery, under overhead cranes, handling molten metal, etc., is sucidal in terms of employee safety. Working in a large plant in the hot-metal industry is not like attending school—even standing still in the wrong place can lead to a serious accident. When accidents do occur, the potential is present for them to be quite serious, all too often resulting in explosions, deaths, and losses of limbs. With present progression lines, strangers with rare exception enter only on entry level jobs generally around the fringes and learn the flow of materials and hazards as they move up into higher-speed, more technical jobs.[35] Under the new system, a significant increase in accidents can be expected. Working conditions will simply be more hazardous to everybody, the transferees and those around him on his team.

10. **Decrease in Qualified Personnel.** The Fifth Circuit stated that nothing in its opinion should be construed to mean that the company must place anyone in a job for which he is not qualified (App. 141). Unfortunately, under the practical realities of the interim order, that caveat amounts to academic lip-service to a standard impossible to reach under the requisite means, as explained hereinabove. Practically, the interim order will result in the filling of jobs with less-qualified[36] and unqualified employees. The result will be a decline in product

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[35] Under the present system, ACIPCO's accident rate has been held to one-third the rate of the industry. Last year petitioner received a major award for safety from the National Safety Council.

[36] See Section II, *infra*.

quality and an increased hazard to employee and consumer safety.[37]

In summary, the interim order exemplifies the problems that courts of appeals face when they act without the benefit of findings by district courts and thereby meddle in areas in which they have no independent expertise. The problem was addressed by this Court recently in surprisingly similar circumstances in *Furnco Construction Corporation v. Waters*, — U.S. —, 57 L.Ed. 2d 957, 968 (1978):

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" then Furnco's method, which the Court of Appeals criticizes as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

On the authority of *Furnco* alone, the interim order requirement and the other items of injunctive relief awarded by the Fifth Circuit in a similar manner (see note 20, *supra*) should be vacated.

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[37] The company's products generally transmit high pressure water and gas. Failures in service due to defective castings, pipe, or deficient iron strength can cause gas explosions or water flooding with property damage and injury. These failures are often extremely costly as in the case where miles of defective pipe are installed under city streets and buildings.

D

The Interim Order Deprives Petitioner of Due Process of Law

The imposition of the interim order prior to a trial[38] on remand, and without the issues raised by the interim order having been tried in the 1971 trial, fails to afford petitioner even the rudiments of due process.

Standing alone, this due process deprivation constitutes a substantial departure from the accepted and usual course of judicial proceedings. But when juxtaposed with the drastic nature of the remedy imposed, which affects the very ability of petitioner to produce—and with the fact that the Court of Appeals was unaware of the effects of that order—the due process deprivation is egregious.

The Court of Appeals' reasoning for imposing the interim order was in part based upon a waiver-of-proof theory, that petitioner had had two opportunities to prove the business necessity of its LOP's and had failed both times. The most recent opportunity referred to was the 1974-1975 remand period following the Court of Appeals' 1974 decision. As petitioner has already shown above, it proved the business necessity in its LOP's during that remand period in the informal proceedings before the District Court. The District Court expressly found the same in its Final Order (App. 48). To ignore totally the evidence adduced in those proceedings, to deprive the company of the opportunity to have such evidence transcribed in a hearing on remand, and further to impose relief flatly repugnant to the evidence informally adduced and the findings of the District Court,[39] constitutes not only a deprivation of due process but is also manifestly unjust to petitioner.

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[38] Even the opportunity for that trial is subject to the discretion of the District Court.

[39] See Section I(B), *supra*.

The earlier opportunity referred to by the Court of Appeals was the October 1971 trial. But the central issue raised at that trial was whether petitioner's departmental seniority system was justified by business necessity. The concern of plaintiffs has always been to streamline the existing LOP's (by increasing the number of connecting lines between jobs within LOP's, the job boxing, etc.) so as to expedite the upward movement of class members.[40] The question of the validity of the LOP structure itself was never raised—at the October 1971 trial or even in the post-1974 remand period in which plaintiffs' counsel of record made objections to the decrees proposed by petitioner. Indeed, at the October 31, 1975 post-judgment hearing—some four years after the trial—plaintiffs' counsel of record, Mr. Adams, stated that:

> I talked with the company's experts and I've talked with and we had our own experts in the trial and I must say that when they look at the lines of progression, *they did not make any substantial alteration*. They did say there were some transfers of skill.[41]

In short, the question of the validity of petitioner's LOP-based promotion and transfer system was not legally relevant in the 1971 trial and was answered in favor of the validity of that system by the District Court in the last remand.[42] The abolition

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[40] As stated above, the District Court's May Decree substantially altered the pre-existing LOP's by requiring such connecting, boxing, etc., to allow such upward movement.

[41] Transcript of October 31, 1977 hearing (emphasis added.) That statement alone should have put the Court of Appeals on notice that the District Court's finding of business necessity in the LOP's was based on sound evidence. Even the plaintiffs' counsel of record for over 10 years was basically satisfied not only with the LOP-based system, but also with that system as modified by the District Court.

[42] Respondents' present counsel moved the District Court for a trial on the merits, asserting as one ground the lack of evidence on the record in support of the District Court's injunctive relief, but such motion was made post-judgment and was denied by the District Court.

of that system was never sought by plaintiffs' counsel of record in the 12-year history of this case. For the Court of Appeals, therefore, to assert that petitioner has waived an opportunity to put on evidence relating to issues that have never been relevant or which have been resolved in petitioner's favor by the District Court is erroneous and unjust. And its subsequent imposition of a remedy before trial denies petitioner of due process of law.

The Court of Appeals, in effect, admits that its interim order deprives petitioner of due process. It provided that—*after* the imposition of the interim order—the District Court "may, at its discretion" give petitioner a "final opportunity" to prove business necessity for its LOP's (App. 142). The right of petitioner to a hearing on the interim order requirement is accordingly recognized—yet, only after the massive alterations in plant operations have been made affecting the ability of petitioner to operate its plant efficiently and safely. This amounts to no more than due process "after the fact". Due process, however, requires an opportunity for a hearing to be afforded *prior to* the deprivation of any interest in liberty or property. *E.g., Fuentes v. Shevin*, 407 U.S. 67 (1973); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). If petitioner is entitled to a hearing at all—which the Court of Appeals apparently concedes—then it is entitled to a hearing prior to the entry of the interim order.

E

The Decision Below Improperly Usurps the Power of the District Court on Remand and Is Beyond the Ambit of Appellate Court Remedial Jurisdiction.

The Court of Appeals in the decision below directs the District Court to enter the interim order prior to any findings by the District Court that the interim order is necessary, fair, or workable. This is an intrusion on the proper function of the

District Court. It is also beyond the ambit of appellate court remedial jurisdiction.

Although the jurisdiction of intermediate appellate courts to review final decisions of district courts, 28 U.S.C. § 1291, and to reverse, remand, modify or otherwise dispose of district court orders, 28 U.S.C. § 2106, is undeniably broad, equitable powers are not without limitation. In decisions involving the restructuring of public or private instructions, the limits of equitable jurisdiction have been scrupulously observed.[43]

In *Lemmon v. Kurtzman*, 411 U.S. 192 (1973), this Court stated that ". . . equitable remedies are a special blend of what is *necessary*, what is *fair*, and what is *workable*." *Id.* at 200 (emphasis added). The restructuring of the operating procedures of a substantial manufacturing company should be left in the first instance to the District Court. That Court should decide whether the restructuring is *necessary*, and if so, should determine how best to tailor and fashion the relief to the peculiar circumstances of the employer so that the restructured system will be *workable* and *fair* to all concerned.[44]

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[43] *E.g., Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) (sweeping legislative reapportionment remedy mandated by three-judge district court overturned); *Minnesota State Senate v. Beens*, 406 U.S. 187, 199 (1972) (drastic modification in Minnesota Legislature by three-judge court overturned); *Milliken v. Bradley*, 418 U.S. 717 (1974) (this Court overturned a multidistrict areawide remedy in an educational discrimination action noting the limits of equitable jurisdiction and, especially, the lack of a "meaningful opportunity" for the outlying school districts to present evidence concerning the propriety of the multidistrict remedy). *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971) (public school system).

[44] *E.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 376 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 436 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 779 (1976); *Furnco Construction Co. v. Waters*, — U.S. —, 57 L.Ed. 2d 957 (1978). *Cf., City of Los Angeles v. Manhart*, — U.S. —, 98 S.Ct. 1370, 1386, 1388 (1978) (Marshal, J., concurring in part and dissenting in part).

II

Relative Versus Minimal Qualification

Under the District Court's decree, the standard for selecting among employees for purposes of promotions was set forth as follows (App. 141 n. 48):

> Qualifications considered in promotion are:
>
> A. Skill, knowledge, training and efficiency
>
> B. Physical fitness
>
> C. Length of service
>
> Where factors A and B are relatively equal, employees with the greatest length of plant continuous service will be given preference.

A virtually identical promotion standard is contained in numerous collective bargaining agreements across the country for similar manufacturing concerns organized by unions.[44a]

The Court of Appeals found that definition of "qualifications" to be inappropriate insofar as it allowed petitioner to consider relative skill, knowledge and training "*before* seniority is considered", stating that (App. 141 n. 48) (emphasis added):

> If accepted, this definition [of qualifications] would allow the company *in almost every case* to place an incumbent in the line because he was "*more* qualified" than a transferee, even though the transferee may be fully qualified and have superior plant seniority. On remand the court must

[44a] For those applicable in the steel industry, *see e.g., Steel Industry Consent Decree*, 8 BNA FEP Manual 431:125, para. 9 at pp. 137-138, *approved, United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975) (same basic standard for promotion contained in collective bargaining agreements approved for application to some 250 plants in steel industry); *United States v. H. K. Porter*, 7 FEP Cases 1021, 1026 (N.D. Ala.), *approved*, 491 F.2d 1105 (5th Cir. 1974) (same standard approved).

> provide that bidding be based initially on plant seniority. The plant may then reject the senior-most bidder only if he fails to meet a threshold level of skill, knowledge and training necessary to perform that job adequately.

Curiously, the Court of Appeals acknowledged in the above-quoted passage that incumbents in the LOP will be *more* qualified to fill vacancies in the line than transferees, in "almost every case." That is precisely the point argued by petitioner, and, in addition, petitioner argues that transferees (with rare exceptions) will be *unqualified* to perform intermediate jobs in LOP's safely and efficiently.

But the critical issue is whether petitioner is prohibited from filling job vacancies with its best qualified employees. The Court of Appeals flatly proscribes it, saying that only a "threshold level" of qualifications necessary to perform the job "adequately" is sufficient to entitle the senior bidder to the job.

Filling a job on the basis of relative qualifications is, *per se*, nondiscriminatory. *See* 42 U.S.C.A. § 2000e-2(a) (App. 191). This Court in *Teamsters* stated that only employment decisions "based on a discriminatory criterion illegal under the Act" can support inferences of discrimination, and that the formula set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for proving the elements of a prima facie case:

> [D]oes demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common *legitimate* reasons on which an employer might rely to reject a job applicant: an absolute *or relative lack of qualifications* or the absence of a vacancy in the job sought. (431 U.S. at 358 n. 44) (emphasis added).

This Court in *Teamsters* further stated that even though an employee can show that he was qualified for a certain job and would have applied for such job absent discrimination, the em-

ployer can show that such employee was nevertheless not a victim of discrimination:

> For example, the employer might show that there were other, *more qualified* persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient.

431 U.S. at 369 n. 53, *citing Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n.32 (1976).

Under *Teamsters*, therefore, relative qualification is clearly not a criterion illegal under the Act. The prohibition in the decision below against promoting on the basis of relative qualifications is contrary to *Teamsters*, will cast a shadow on numerous collective bargaining agreements across the country, and will encourage mediocrity in employee performance. Cognizant that promotions will be based on seniority alone, employees will have no incentives to excel and improve their performance. The result will be an overall decline in the ability, aggressiveness, and efficiency of the workforce—a result clearly never intended by Congress in enacting Title VII. The ability of ACIPCO to compete successfully in the highly competitive pipe industry is due in large part to its ability to encourage and harness the collective competitive energies of its employees. The prospect of denying a job vacancy to an employee who has put forth the extra effort necessary to be the best qualified, whose performance will directly result in higher overall efficiency, fewer accidents, and higher profits—in favor of an employee barely qualified to perform a job—is contrary to common sense and certainly unwarranted under Title VII as construed by this Court.

III

The Back Pay Releases

Are releases of claims under employment discrimination laws valid if voluntarily and knowingly executed? Petitioner understood that question to have been answered by this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that the mere submission of an employment discrimination claim to arbitration did not, on election of remedies grounds, preclude a suit in federal court under Title VII. In dicta, however, the Court stated that had the parties reached a "voluntary settlement" of their claims "conditioned on a waiver of petitioner's cause of action under Title VII," that such waiver would be valid if "voluntary and knowing." 415 U.S. at 52 n.15.

Even the Fifth Circuit in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), upheld the use of release forms in connection with the nationwide steel industry consent settlement, stating that:

> Very frankly, we cannot conceive of how any employment discrimination dispute could ever be resolved outside, or indeed inside, the courtroom, if defendants were forbidden to obtain binding, negotiated settlements. No defendant would ever deliver money, promises, or any other consideration—not even a peppercorn—except after entry of a contested, final court order, and even this, on appellants' reasoning, might not end the matter. (517 F.2d at 858-59).

But the same Fifth Circuit in the instant case rode roughshod over releases executed by 399 class members who received and cashed back pay checks totalling almost half a million dollars—without any attempted showing by the releasors that the releases were involuntarily or unknowingly executed or any discussion of such issue by the Court of Appeals.

The Court of Appeals accomplished this feat by first characterizing the back pay judgment as a consent judgment, and then by holding that the class members should not have been required to "opt into" the back pay "settlement" before a final determination of the propriety of that settlement is made (App. 186).

Petitioner is still unable to comprehend how the back pay judgment became a consent judgment without its consent to the same, but apart from that problem, petitioner submits that releases of claims are valid, if executed voluntarily and knowingly, whether executed in connection with consent settlements or litigated judgments on the merits. Releases of claims should not be subject to invalidation without a showing that the releases were involuntarily or unknowingly executed. The invalidation of the releases in the instant case without a trial has deprived petitioner of property (almost half a million dollars) without due process of law.

In view of the increasing number of employment discrimination actions, the numerous forums available for the vindication of equal employment rights, and the numerous parallel and overlapping remedies available for such vindication, the release of claims is about the only means by which an employer may obtain an end to discrimination lawsuits. The decision below is of critical importance to enforcement proceedings in the employment discrimination area and this Court should exercise its supervisory powers to resolve the conflict and uncertainty in this important area created by the decision below.

IV

Business Necessity

This Court has consistently set forth a three-step standard governing the determination of whether a particular business practice is unlawful: First, the plaintiff must make out a prima facie case of discrimination (for example, that employment tests select applicants for promotion in a racial pattern significantly different from that of the pool of applicants). Second, the employer may rebut the prima facie case by showing that the employment practice is "job related." Third, the burden

then shifts back to the plaintiff to demonstrate that other substitute employment practices will also serve the employer's legitimate interest in efficient and trustworthy workmanship.[45]

In the Fifth Circuit, however, a far different standard exists for determining whether a business practice is unlawful. Upon finding in 1972 the existence of discrimination[46] and that petitioner's departmental seniority system perpetuated the effects of the discrimination,[47] the Fifth Circuit ordered the abolition of that system, including the progression lines, subject only to petitioner's right to demonstrate a "business necessity" for the LOPs (App. 115). The burden on petitioner to prove business necessity was said to be "heavy"; the fact that the LOPs served "legitimate management functions" and "directly foster safety and efficiency of a plant" was not enough (App. 115-16). For the LOP system to be preserved, petitioner was required to sustain its burden of demonstrating an "irresistible demand" for such system as being "essential" to petitioner's safety and efficiency and further demonstrate "no acceptable alternatives" for accomplishing those goals (*id.*).

The procedure mandated by the Fifth Circuit directly conflicts with the procedure set forth by this Court, in two major

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[45] *Furnco Construction Corp. v. Waters*, — U.S. —, 57 L.Ed. 2d 957, 968 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 339 (1977) (concurring opinion of Rehnquist, J.); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-805 (1973).

[46] Basically pre-Act assignment discrimination and unlawful testing and education requirements. See note 6, *supra*.

[47] Because of the seniority system, the Court of Appeals found in 1972 that black employees desiring to transfer to a department with better promotional opportunities would have to forfeit seniority in transferring, and after transferring, would not be able to compete equally for promotion with whites who had more departmental seniority yet less plant seniority than the transferee (App. 114). This "lock-in" effect was eliminated by the May, 1975 Decree, however, which awarded transfer rights based on plant seniority to all employees and rate retention for transferring blacks.

respects. First, under the second step referred to above, the employer need only show that the practice is "job related." *Albemarle*, 422 U.S. at 425; *Furnco*, 57 L.Ed. 2d at 968 ("the employer need only 'articulate some nondiscriminatory reason' " for the practice in question). The Fifth Circuit improperly transforms the "job related" burden into a Herculean burden of showing an "irresistible demand" for the system and "no acceptable alternatives "

Second, under the decision below, the third step of this Court's standard is omitted. The plaintiff is not required to propose any alternative practices under the Fifth Circuit's standard, or sustain any burden whatsoever to prove that an alternative system exists that will be as workable, safe, and efficient as the existing system.[48]

Comprised in petitioner's fourth question is the important subsidiary question of whether this Court's three-step procedure applies to employment practices found to be neutrally applied, without regard to race, but which have been found to perpetuate the effects of past discrimination.[49] Petitioner submits that it should. When deciding whether to restructure neutral employment practices[50] in an effort to enable discriminatees to achieve their rightful places, district courts should

[48] Technically, under the Fifth Circuit's standard, this Court's third step is compressed into this Court's second step and the burden is reversed, by requiring the employer to prove the negative—that no acceptable alternative practices exist.

[49] In every case in which this Court has applied its three-step procedure discussed above, the question has been whether a specific employment practice shown to be discriminatory should be enjoined. *Griggs v. Duke Power Co.*, 401 U.S. 421, 432 (1971) (employment tests); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employment tests); *General Electric v. Gilbert*, 429 U.S. 125, 97 S.Ct. 409 n.14 (1976) (pregnancy leave disability plan); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (minimum height and weight requirements).

[50] *E.g.*, petitioner's LOP-based promotion and transfer system.

not cast aside every practice thought to impede such advancement without proof that alternative measures exist that are equally as safe and efficient as the existing practices. Plaintiffs should be required to shoulder some burden for this proof, and employers should be allowed to demonstrate that certain alternative measures suggested are less efficient and safe than the existing procedures.

V

The District Court's Discretion Over the Back Pay Award

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court held that the award of back pay is not an "automatic or mandatory" remedy, but is subject "in the first instance" to the discretion of the district courts, which discretion is to be guided by the "twin statutory objectives" of the back pay remedy—to insure future compliance with the Act and to compensate victims of discrimination.[51] This Court thereby overturned the "special circumstances" test which made the award of back pay virtually automatic, expressly citing the Fifth Circuit's prior decision in the instant case, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), as one of the circuits articulating such a test. 422 U.S. 413 & n.6.

In the decision below, however, the Fifth Circuit in its guidelines to the District Court for the award of back pay,[52] requires that Court to follow the guidelines set forth in its prior opinion, *Pettway*, 494 F.2d 211, and other Fifth Circuit opinions (App. 163-69). Nowhere is the District Court clearly required (or

[51] *Accord, City of Los Angeles v. Manhart*, — U.S. —, 98 S.Ct. 1370, 1381 & n.35 (1978) *citing Albemarle.*

[52] Although back pay was awarded to 841 class members, it was denied to the 1401 class members who were hired after July 2, 1965 (see Statement of the Case, Section C, *supra*).

allowed) to exercise any discretion over the award of back pay consistent with *Albemarle*. The award of back pay appears once again to be virtually automatic in the Fifth Circuit.

VI

Class Members' Burden to Demonstrate That They Were Victimized by Unlawful Discrimination

The Fifth Circuit's approach to the back pay and injunctive relief issues was premised upon its statement that "[t]here is no way of determining which jobs the class members would have bid on and have obtained" in the absence of the discriminatory policies. 494 F.2d at 260. Therefore, as stated by the Fifth Circuit, the "maximum burden" that can be imposed on the individual claimant for back pay purposes is to require a "statement" of his (1) current position and pay rate, (2) the jobs he was denied because of discrimination and their pay rates, (3) a record of his employment history that qualified him for the denied positions, and (4) an estimation of the amount of requested back pay. The burden then shifts to the company to challenge particular class members' entitlement to back pay (App. 169). In computing the final award, "unrealistic exactitude" is not required, and "uncertainties" in determining what an employee would have earned but for the discrimination "are to be resolved against the discriminating employer" (*Id.*).

In *Teamsters*, this Court made it clear that even though discriminatory employment policies are found to exist, individual class members must show that they were potentially victimized by those policies, or else there is no unlawful discrimination as to them:

> Because [a nonapplicant] is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is not always the easy burden of proving that he would have applied for the job had it not been for those practices (431 U.S. at 367-68).

Thus, in the instant case, any class members who would not have desired to transfer to a different department ***even though*** no discriminatory educational or testing policies existed, cannot claim to be potential victims of unlawful discrimination under *Teamsters*.[53] More importantly, the question of whether class members would have transferred absent such policies cannot be avoided by concluding that "[t]here is no way of determining" the matter.

The injunctive relief awarded by the District Court has been in effect for over three years, and petitioner does not contend that class members should be required now to prove that they were potential victims of discrimination as a prerequisite to their entitlement to that relief. Petitioner does contend, however, that class members should be required to bear such burden as a prerequisite to any back pay relief[54] and to any transfer rights under the interim order.

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[53] In the District Court's 1972 opinion, one of the principal reasons for its denial of back pay to the class was the "voluntary freezing" by class members into lower-paying jobs, consisting, *inter alia*, of: (1) declinations by class members of promotional opportunities offered to them; (2) demotions of class members due to their inability to perform certain jobs satisfactorily; and (3) refusals by class members to bid on job vacancies posted in the plant. 7 FEP Cases 1016.

[54] *See Mitchell v. Mid-Continent Spring Co.*, — F.2d —, 17 FEP Cases 1594, 1601 (6th Cir., Sept. 8, 1978) (Sixth Circuit construed *Teamsters* as overturning Fifth Circuit's standard for awarding back pay articulated in *Pettway*, 494 F.2d at 260, quoted above).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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November 8, 1978

APPENDIX A

Decree of the District Court for the Northern District of Alabama Entered May 14, 1975

In the United States District Court
For the Northern District of Alabama
Southern Division

Rush Pettway, et al.,
Plaintiffs,
v.
American Cast Iron Pipe Company,
Defendant.

Civil Action
No. 66-315

DECREE

The Court having jurisdiction over the subject matter of this action and of the parties, and the Court being advised in the premises,

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant, American Cast Iron Pipe Company (hereinafter the Company), its officers, agents, employees, and successors and all persons in concert or participation with it be, and hereby is, enjoined and restrained from engaging in any acts or practices which have the purpose or effect of discriminating against any individual because of race, religion, sex or national origin, and is ordered and directed as more specifically set out in the body of this Decree:

1. This Decree is and shall be applicable to the Company's plant located at Birmingham, Alabama.

2. LENGTH OF PLANT CONTINUOUS SERVICE.—

(a) Plant continuous service (hereinafter plant service) shall be used beginning with the effective date set out in paragraph 16 of this Decree for all purposes in which a measure of continuous service is presently being utilized,

provided, however, the change to plant service shall be accomplished without that change in and of itself affecting the relative position of any employee within a line of progression. In other words, there shall be no leapfrogging over or bumping between employees solely as a result of the entry of this Decree. However, all future promotions, step-ups, demotions, layoffs, recalls and other practices affected by seniority shall be in accordance with plant service provided that, (1) demotions, layoffs, and other reductions in force shall be made in descending job sequence order in each line of progression starting with the highest affected job and with the employee on such job having the least length of plant service, (2) the sequence on a recall shall be made in the reverse order so that the same people shall return to their jobs in the same positions relative to each other that existed prior to the reductions, and (3) where economic conditions necessitate an overall reduction in the plant-wide work force, employees with the lesser plant service shall, subject, however, to the Company's right to retain in its active service such employees with craft, critical job and other specialized skills as may be reasonably required for the continued efficient and safe operation of the Company, be laid off from active service with the Company prior to those employees with greater plant service, and the laid-off employees shall be recalled to active service in the reverse order of their layoff.

(b) Where an employee transfers subsequent to the effective date of this Decree from one line of progression to another or from one department to another, his plant service shall be used for all purposes as provided in Paragraph 2(a) subject, however, to the residency provision in Paragraph 4.

3. PERMANENT VACANCIES AND TRANSFER RIGHTS.—Permanent transfer between lines of progression

within a department and between departments shall be accomplished in accordance with the procedures set forth in this Paragraph 3 and in Paragraph 5.

(a) A permanent vacancy is a vacancy created by an employee promotion or demotion (permanent), death, discharge, quit, retirement, or transfer out of the seniority unit or department.

(b) A two-step procedure for filling permanent vacancies within lines of progression shall be established. A permanent vacancy shall be filled from within the first step of competition (incumbent employees working in or laid off from a line of progression within the department). Each succeeding vacancy shall be filled in the same manner and the resulting vacancy in the entry level job or other job, if not filled by employees working in or laid off from the line of progression within the department, shall thereafter be filled on a plant-wide bid basis, by employees with at least six months of plant service on the date the vacancy is posted.

(c) An employee who transfers pursuant to this Decree shall have the right to return to his former department within a thirty working day period commencing from the date of his transfer or may be returned by management within such period, in the event he cannot meet the requirements of the job to which he has been assigned in his new department. Such employee shall be returned to his former job, if available, or if not then available to a comparable job within his former department, if available, or if none, then to the next lower rated available job in his former department, and his return to his former department within such period shall be without loss of his seniority standing in his former seniority unit and department.

(d) Permanent vacancies on entry level jobs or other jobs if not filled by employees working in or laid off from

the line of progression within the department, to be filled in plant-wide competition as provided in Paragraph 3(b) above, shall be posted on a plant-wide basis in accordance with Paragraph 10 of this Decree and such other administrative rules as the Company may reasonably adopt, provided, however, such rules shall require that (1) the notice of vacancy posted shall indicate the department, job title, the pay group of the job, any prerequisite qualifications, training, experience or skill, the estimated number of employees needed, and the date of posting, (2) the Company shall provide in the department where the vacancy occurred and in the Company's Employment Office bid lists which employees desiring to bid on the vacancy may sign, (3) the subsequent notice of the prevailing bidder or bidders shall indicate his or their plant continuous service dates.

(e) Permanent vacancies may be filled by temporary assignments until such time as the prevailing bidder is selected and assigned.

4. RESIDENCY.—Whenever an employee by successful bidding enters a new line of promotion, his continuous service date for promotional purposes in the new line shall, for the period of one year following the date he begins work in such new line on a permanent basis, be the date on which he so begins work in such line. After the expiration of such year his continuous service date for promotional purposes in such line shall be his plant continuous service date, which said date shall even during such first year be his seniority date for purposes of retention in or recall to such line.

5. PRE-ENTRY GROUP AND ADVANCED ENTRY JOBS.—

(a) **Pre-Entry Group Jobs.** Certain lower-rated, unskilled jobs in certain departments have been identified on the lines of progression charts for those departments as pre-

entry group jobs and have been placed together in a pre-entry group box. A permanent vacancy occurring on a job within a pre-entry group box shall be filled by the qualified employee who is working on or is laid off from another job within the pre-entry group box, who has the greatest plant service, provided he is physically able and qualified to perform the job, and who has, prior to the occurrence of the permanent vacancy, indicating in writing to the office of the department where the permanent vacancy occurs his preference to be considered for the next vacancy on such job, provided, however, an employee shall be eligible for only one such job preference award a year.

(b) **Advanced Entry Jobs.** Notwithstanding the provisions of Paragraph 3 and notwithstanding the location of any of the following jobs within a line of progression, the following jobs, the job descriptions of which are attached to this Decree as Appendix E and made a part hereof, are established as advanced entry jobs within the departments indicated and permanent vacancies on those jobs shall be posted and filled on a plant-wide basis by the bidder with the longest plant service provided he has had the prerequisite training and is qualified and physically able to perform the job:

Department	Advanced Entry Job
Monocast Department	Mold Machinist and Welder
Steel Pipe Department	Toolman
Machine Shop	Radial Drill Operator
Electrical Department	Machinist
Construction Department	Roof and Drainman Heavy Equipment Operator
Shipping Department	Tractor Trailer Operator

6. TRAINING.—All employees shall continue to have reasonable opportunity to acquire on-the-job training for jobs next in line to which they are eligible for permanent or temporary assignments within their respective lines of progression.

7. RATE RETENTION.—

(a) Any black employee whose plant continuous service date precedes February 18, 1968, shall be entitled to rate retention hereinafter set out on the occasion of one transfer into a line of progression in a department other than the department in which he is employed on the effective date of this Decree provided that transfer is made within three years of the date of the entry of this Decree.

(b) An employee who transfers with rate retention pursuant to this paragraph shall, if the rate for the job to which he transfers is lower than the rate he was being paid on his former job, retain and be paid at his rate on his former job. In no event shall an employee's retained rate exceed the lower of (1) the standard hourly wage rate in effect for jobs in pay group 8 on the date of the employee's transfer or (2) the standard hourly wage rate of the highest job in the line of progression to which the edployee is transferring.

(c) An employee's retained rate shall be adjusted only for general wage increases.

(d) An employee's retained rate shall be terminated for all purposes on the occurrence of any one of the following:

(1) He has progressed in his new progression line to a job of equivalent rate to his retained rate.

(2) He fails to progress in the new progression line.

(3) He declines to progress in the new progression line.

(4) 104 weeks have elapsed since his transfer to a new progression line.

(5) He bids to another line of progression or department.

8. APPRENTICESHIP PROGRAM.—The Company shall eliminate from its apprenticeship program any requirement that any candidate for the program be a high school graduate or equivalent unless and until such educational requirement or any other educational requirements which are proposed for use in selecting employees for entry into the Company's apprenticeship program shall have been validated in accordance with the Equal Employment Opportunity Commission's "Guidelines On Employee Selection Procedures." (29 CRS § 1607). In considering applications for entry into the Company's apprenticeship program by black employees who reached the maximum age for entry into the program between July 2, 1965 and April 1, 1971, the Company shall as to those black employees enlarge its age prerequisite for entry into the apprenticeship program to age not past thirty-fifth birthday provided that any such employee file with the Company's Personnel Department within four months of the date of entry of his Decree on a form to be supplied by the Company a written indication of his interest in being considered for a specific apprenticeship opening.

9. TRAINEE PROGRAM.—From and subsequent to the effective date of this Decree plant continuous service shall be utilized as the measure of continuous service rather than departmental continuous service in the administration of the Company's Trainee Program.

10. NOTICES, RECORDS AND REPORTS.—

(a) The Company shall publish and post the terms of the Decree in prominent places throughout the plant. Further copies of this Decree and the attachments hereto shall be available in the Company's Personnel Office to all employees.

(b) Notices of all permanent vacancies which occur in entry level jobs, advanced entry jobs, or other line of progression jobs not filled by employees working in or laid off from the line of progression involved shall be posted on the bulletin boards located at the clock house located at the entrance to the Company's pipe shop and the clock house located at the West end of the Company's Construction Department Building and may be posted elsewhere as determined by the Company, at least three working days in advance of their being permanently filled so as to insure that all eligible employees will be notified of their existence and eligible employees shall have an opportunity to make application therefor.

(c) Notices of the filling of all permanent vacancies in any jobs shall be posted for three working days on the bulletin boards of the clock houses identified in preceding subparagraph (b) and may be posted elsewhere as determined by the Company. This notice shall show the name, badge number, and plant service date of the employee selected, the department and job title of the job involved and the effective date of the selection.

(d) The Company shall maintain appropriate personnel, payroll, bidding, and other records necessary to monitor compliance with and progress made under the provisions of this Decree. Such records shall include for every vacancy posted on a plant-wide basis the job title, job pay group, department and, in order of plant service dates, the name, badge number, race, and plant service date of every bidder, with an indication of the prevailing bidder. Where a prevailing bidder is other than a bidder with the earliest plant service date the reason or reasons therefor shall be indicated. All such records shall, on reasonable notice, be made available for inspection by the Court or its designated representative.

11. GRIEVANCE PROCEDURE.—Pursuant to the prior Decree of this Court dated January 21, 1970, removing the racial restrictions for election to membership on the Company's Board of Operatives and disestablishing the advisory Auxiliary Board limited to black employees, the Company made provision for continued bi-racial employee representation on its long established employer-employee committees, such as the Seniority Committee, the Rate Committee, the Discipline Committee, and the Apprentice Committee, by providing that two white members and two black members from the Board of Operatives serve on each of those committees or in the absence of a sufficient number of members of a particular race on the Board of Operatives, employees of that race receiving the most votes in the prior election of Board members serve on those committees and the Court determines that questions as to application of and compliance with the provisions of this Decree can be fairly and properly referred to and handled bp the appropriate committee. Accordingly, any differences arising between the Company and any employee as to the interpretation or application of, or compliance with, the provisions of this Decree shall be submitted to the grievance procedure set forth in the Company's current grievance procedure, a copy of which is hereto attached as Appendix A and made a part of this Decree or in any future grievance procedure adopted by the Company consistent with this Decree and Title VII of the Civil Rights Act of 1964, provided, however, a copy of any "Decree Related" grievance shall be promptly furnished to the Implementation Committee in accordance with Paragraph 12 of the Decree and provided, further, that, in no way, shall this provision infringe upon or in any way limit this Court's continuing jurisdiction of this action, nor shall it in any way limit the right of any employee to seek judicial review or affect the rights provided any employee by Title VII of the Civil Rights Act of 1964.

12. IMPLEMENTATION COMMITTEE.—

(a) Within ten days after the entry of this Decree, the Company shall designate an individual (and an alternate to act in his unavoidable absence) to serve as convener and ex officio non-voting chairman of a four person Implementation Committee. The Chairman of the Board of Operatives and the Chairman of the Working Conditions Committee of the Board of Operatives shall serve as two members on the Implementation Committee and two additional members shall be black employees of the Company who shall be appointed by the Court after considering nominations by plaintiffs' counsel. The convener shall be responsible for convening the Implementation Committee as required to handle its business and shall also be responsible for preparing a record of actions taken at Committee meetings for signature by the Committee members who shall, when performing services on the Committee, be compensated at the expense of the Company at a rate comparable to the income which would have been received by them had they remained on their respective regular job assignments. Any matter as to which there is disagreement among Committee members may be submitted to the Court for resolution.

(b) The Implementation Committee shall:

(1) Take all steps necessary to monitor compliance with this Decree.

(2) Assure that information is provided to employees concerning their rights and opportunities under this Decree.

(3) Not process or handle complaints or grievances. Employees having complaints or grievances arising out of actions taken or not taken pursuant to this Decree shall process such complaints or grievances

through the Company's established grievance procedure. Any complaint or grievance appropriately initialed by an employee which is alleged to involve the application of this Decree in whole or in part shall be noted on the grievance form as "Decree Related". Copies of all such "Decree Related" grievances shall be furnished promptly to the Implementation Committee. All actions taken with respect to such grievance shall be promptly reported in writing to the Committee for its review and, if appropriate to effectuate this Decree, its recommendation for appropriate action. If the Implementation Committee is dissatisfied with the action taken relative to its recommendation the Implementation Committee or any member thereof or the aggrieved employee may bring the matter before the Court for determination.

(4) Be available at a central location during hours convenient to mose employees for at least a period of five consecutive days during the initial implementation of this Decree and at such times thereafter as may be reasonably required. At least ten days prior to the effective date of the substantive provisions of this Decree, the Company shall address a letter to each employee at its Birmingham plant. The letter shall explain and outline in general terms the provisions of this Decree and procedures eestablished by it. The letter shall also advise of the establishment of the Implementation Committee, the identity, business address and telephone number of its members, the dates, times, and places at which its members will be available to provide further information and explanations concerning this Decree and its implementation. The text of such letter shall be submitted to the Court for approval prior to its issuance. Nothing herein shall prevent the Company from sending appropriate information to its employees at any time.

(5) The Implementation Committee shall function until December 31, 1977 except that, for good cause shown, the Court may extend such period.

13. DETERMINING QUALIFICATIONS.—The Company shall have the right to refuse to promote or assign on a temporary or permanent basis, or to allow transfer of, any employee it determines is unqualified.

14. SENIORITY AND LINES OF PROGRESSION.—The Company's policies, rules, and procedures governing seniority filling job openings, promoting, job bidding, cutting back and layoff attached hereto as Appendix B (collectively referred to as "seniority rules and regulations") are consistent with the principles set forth in this Decree and are hereby established in the form of Appendix B attached hereto and made a part of this Decree by reference. The lines of progression of the Company's departments to be effective upon the entry of this Decree are hereby established in the form set out on the lines of progression charts attached hereto as Appendix C and made a part of this Decree by reference. The seniority rules and regulations and lines of progression may be altered or added to by the Company provided that any such alteration or addition is consistent with the purposes of this Decree and the principles of seniority established herein.

15. BACK PAY.—

A. The Company is directed to calculate back pay in accordance with the following directions:

(1) The Company shall prepare by departments and chronological order a list of the permanent job openings which occurred in the jobs in the lines of progression in each department in pay group 4 and above between July 2, 1965 and March 31, 1971.

(2) The Company shall prepare by departments and in employment date sequence a seniority list of black employees

(a) whose employment date with the Company precedes July 2, 1965 and

(b) who are presently working in the department or are presently on pension from that department or

(c) who after July 2, 1965, left the employment of the Company from that department with at least one year of Company service.

The Company shall prepare similar seniority lists for white employees.

(3) The Company shall prepare from its rate progression schedules in effect during the period from July 2, 1965 through December 31, 1974 a table of the maximum wage increases or differential which any employee accepting a promotional opportunity could have enjoyed in moving up from a job in one pay group to a job in the next higher pay group in any six month period from July 2, 1965 through December 31, 1974, the wage differential for each six month period to be calculated on the basis of the then existing differential in wage rate between pay groups multiplied by 1,040 hours.

(4) The Company shall then assign for calculation purposes the highest promotional opportunity which occurred during a calendar year or during the first three months of 1971 as the case may be, and which were not in fact filled by another black or senior white employee to the black employee having the greatest plant seniority in that department. Similar assignments shall be made in plant seniority sequence to the other black employees on the seniority list up through March 31, 1971.

(5) The Company shall then in accordance with specific instructions attached to the Decree as Appendix D calculate for each black employee assigned a promotional opportunity in accordance with the next preceding subparagraph the wage differential that he would have earned on the assigned job in accordance with the table referred to in foregoing subparagraph A(3) over the wage rate he was paid on the job held by him or would have been paid on promotional opportunities declined by him during said period for the period of time beginning with the date of the assigned job opening until the first of the following is reached:

(a) December 31, 1974;

(b) Date the employee went on pension;

(c) Date the employee left the Company's service; or

(d) The employee's advancement on the assigned job reaches the pay group equal to the highest level job the employee has successfully performed to date, provided, however, this limitation shall not apply to those pensioners who retired between July 2, 1965 and July 1, 1969, and did not within that period decline promotional opportunities.

(6) The Company shall, in making the calculations specified in the next preceding subparagraph, treat a promotional opportunity declined by a particular employee the same as an accepted one to the end that the wage differential between what the employee would have earned on the assigned job will be measured from the wage level which the employee would have enjoyed had he accepted the promotional opportunity and advanced thereafter in accordance with the wage progression schedule then in effect.

(7) When an employee has failed on a higher level job and moved to a lower level job and then later succeeded on a higher level job than the lower job to which he moved, the time spent on the higher level job failed on and the time spent on the lower level job to which he moved on such failure will be removed from the calculation of any back pay for such employee. Similarly, where an employee has bid down from a higher level job to a lower level job and has subsequently bid to a job at a higher level than said lower level job, the time spent on the higher level job from which he bid down and the time spent on the lower level job to which he bid down shall be removed from the calculation of any back pay for such employee.

(8) The Company shall prepare for each black employee on the seniority lists referred to in foregoing subparagraph A(2) above a back pay calculation sheet in a form substantially similar to the form constituting a part of Appendix D attached to this Decree and shall compute interest at 6% per annum from the midpoint of each six-month period in which back pay is determined to be payable under the directions contained herein to December 31, 1974 by multiplying the back pay determined for any six-month period by the appropriate factor set out on the table of interest calculation factors constituting a part of Appendix D attached to this Decree.

(9) The Company shall prepare by departments and in plant seniority sequence a tabulation of the black employees on the seniority lists referred to in foregoing subparagraph A(2) above, showing for each such black employee the amount, if any, of back pay calculated for such employee and separately the amount, if any, of interest calculated thereon.

B. The Company shall by June 6, 1975, file the tabulation described in foregoing subparagraph A(9) with the Court for

initial review *in camera*. Following review by the Court and the entry of such order as the Court deems appropriate to remedy any apparent inequities, the Court will direct forthwith the publication of the tabulation as may be modified or changed by the Court in the due exercise of its discretion and thereafter the parties hereto and any person listed in the tabulation shall have ten days from the date of the publication of the tabulation within which to file his or their objections or exceptions to the published tabulation or any part thereof. The Company shall also make available to plaintiffs' counsel all supporting documents necessary or appropriate to check the accuracy of the Company's calculations.

C. The Court reserves for later determination the question of whether objections and exceptions shall be heard and decided by the Court or shall be referred to a Special Master. The Court retains jurisdiction to enter in favor of each black employee for whom back pay is determined in accordance with these directions a judgment in the amount of such back pay plus the interest calculated thereon in accordance with these directions and denying back pay relief to all other black employees involved in this suit.

D. It shall be a condition to the receipt of any back pay that the recipient execute a release, in a form to be approved by the Court, of any claims against or liability of the Company, its officers, directors, agents, employees, successors and assigns, resulting from any violation or alleged violation based on race or color, occurring on or before the date of the entry of this Decree, of any equal employment opportunity laws, ordinances, regulations, or orders, including but not limited to Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000e *et seq*. the Civil Rights Act of 166, 42 USC *et seq*., and any other applicable federal, state, or local constitutional or statutory provisions, orders or regulations.

16. EFFECTIVE DATE.—The provisions of this Decree shall apply fully beginning June 1, 1975 except as a time table set out in a special provision of the Decree provides otherwise. This is a final order and judgment; provided, however, that inasmuch as certain matters have been reserved for further proceedings this shall not constitute an appealable judgment until all remaining issues have been determined or until the Court hereafter enters an order under Rule 54(b).

17. PRIOR DECREES.—Except as herein and hereby superseded, supplemented or modified, the prior decrees entered by this Court in this action shall remain in full force and effect.

18. COSTS AND ATTORNEY'S FEES.—Taxation of cost and award of attorney's fees and the amount thereof will be determined by the Court upon hearing.

19. RESOLUTION OF THE CASE.—This Decree resolves all issues between plaintiffs, plaintiff class and defendant relating to alleged acts of discrimination arising on the grounds of race under Title VII of the Civil Rights Act of 1964, as amended, and under 42 U.S.C. § 1981, occurring prior to the effective date of this Decree and relating to testing, seniority and transfer system, bidding procedures and other matters subject to this Decree.

20. RETENTION OF JURISDICTION.—The Court will retain jurisdiction not only until disposition of those matters on which further proceedings are needed under this Order, but also thereafter, for the purpose of issuing any and all additional orders or decrees as may be necessary to effectuate full and complete compliance with Title VII of the Civil Rights Act of 1964 or to enforce or clarify the implementation of the Decree. At any time after three (3) years from the date of entry of this Decree, defendant may move, upon sixty (60) days' notice to counsel for plaintiffs, and upon a showing of compliance

with the terms and conditions of this Decree, for its modification or dissolution.

DONE this the 14th day of May, 1975.

/s/ Seybourn H. Lynne
UNITED STATES DISTRICT JUDGE

Appendix A to Decree*

GRIEVANCE PROCEDURE

Any employee who has a question or possible grievance concerning successful bidder, qualifications, or any decisions from the bid system or seniority administration should question his foreman immediately and the foreman should explain or obtain explanation.

If not satisfied with the foreman's explanation, the employee may file a written grievance to the department head or his designated representative within ten working days of the announcement of successful bidder, or promotion within the progression line. The written grievance should indicate the job bid and the basis for his grievance. If he chooses, the employee may obtain the help of the Board of Operatives' member in his district in processing his grievance.

Within ten working days after receiving such grievance, the department head must answer in writing with a copy to the Personnel Department. The department head should explain to the aggrieved employee. If the employee wishes, the Board of Operatives' member in his district may be requested to be present.

If the employee is not satisfied with the answer from the department head, he can file a written grievance within ten working days to the Personnel Department which should be answered within ten days.

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* (Certain other appendices attached to this decree have been omitted in printing. A copy of the omitted appendices has been lodged with the Clerk of this Court under separate cover.)

If still not satisfied, the employee may file a written grievance within ten working days to the Works Manager's office requesting review by the Senority Committee, (or appropriate committee if grievance applies to Apprentice Committee, Rate Committee or another committee.)

At any previous step the department head or the Personnel Department may request interpretation by the Seniority Committee or appropriate committee.

If the Seniority Committee on any of the previous steps determines that the grieving employee should have received the job in question, he shall be assigned the job and displace the employee erroneously assigned to the job. The employee erroneously assigned to the job will be returned to his previous job.

If no grievance is filed within ten working days of announcement of successful bidder or filling a vacancy in the progression line, no grievance shall be entertained challenging the job assignment made.

No grievance will be recognized unless all necessary procedures outlined above have been followed.

August 15, 1974

Appendix B

POLICIES, RULES AND PROCEDURES
SENIORITY, PROMOTIONS, BIDDING

Following are Policies, Rules, and Procedures for administration of Seniority, Filling Job Openings, Promoting, Job Bidding, Cutting Back, Laying off, and all aspects of fair administration of Seniority principles toward keeping jobs filled and maintaining safe and efficient operation.

These Policies, Rules, and Procedures have been revised to comply with our interpretation of directives contained in the opinion of the United States Court of Appeals for the Fifth Circuit dated April 29, 1974.

These rules apply to jobs in the plant. Seniority is based on continuous service with the Company at the Birmingham Plant.

In referring to an employee's job, rate, or seniority, any reference to "he" or "his" simply relates to the employee person whether male or female. All Policies, Rules, and Procedures apply equally to male and female and to all races, religions and national origins.

August 16, 1974
Changes 2/3/75

SENIORITY POLICY

Filling job openings

When an opening occurs on an entry level job in any progression line in any department, the job vacancy will be posted plant wide for bids for three working days.

The vacancy will be filled by the qualified bidder with the longest plant seniority. If no acceptable bid is received the job will be filled from the pre-entry group, labor pool, or with new hires.

For developing skills necessary for competitive efficiency, progression lines will be maintaiined in each department for each type of work, skill, or craft. These lines will include normal progression of skills and experience as an employee moves from entry level up through more skilled jobs in that progression line. Record of the latest approved progression lines will be maintained in department office and Personnel Department.

Higher jobs in a progression line above entry level will be filled with the qualified candidate with the most plant seniority in one of the jobs next below in the progression line.

Certain designated jobs at advanced level above entry level will be open to plant wide bidding. (Where skills in other departments are applicable.)

In the event the senior candidate holding the next job below the vacancy is not qualified or declines to accept the job opening, those satisfactorily performing the next lower jobs in the progression line will be considered on the basis of qualification and seniority.

An employee who refuses a permanent promotion will be required to sign a waiver form specifying whether such refusal is limited to that particular occupation or all such promotions. Such waiver will apply on all future promotions as indicated in the waiver form unless revoked in writing before a job opening.

Qualifications

Qualifications considered in promotion are:

A. Skill, knowledge, training, and efficiency

B. Physical fitness

C. Length of service

Where factors A and B are relatively equal, employees with the greatest length of plant continuous service will be given preference.

On jobs requiring job progression or prerequisite training, the employee must meet the minimum requirements of the job.

Transfers

Employees transferred on a permanent basis from one department to another shall retain their plant seniority for purposes of benefits and lay off protection.

Whenever an employee bids into a new progression line his seniority for purposes of promotion will be his time in the progression line until he has one year's experience in the new progression line. After one year in the progression line his promotion seniority will be based on continuous plant service.

Employees who are transferred from one department to another through bids on plant wide postings shall not be eligible to bid on another job requiring departmental transfer for a period of one year.

Lay-off

Should economic conditions make it necessary to reduce the working force, plant seniority shall be followed. Those laid off will be employees with the least plant wide continuous service. The selection of people to be laid off shall be subject to approval by the Seniority Committee.

Recall

Recall from any lay-off caused by reduction in work force shall be made on a plant seniority basis. Any job opening in the plant occurring subsequent to any such lay-off within two years from the date of the lay-off shall be offered to the employee in lay-off status who has the longest company service and whose qualifications meet the requirements of the job to be filled. Such employees shall have the option of accepting the first job opening which he is qualified to fill or waiting until a job comes open in the department or classification held by him prior to the lay-off. This procedure shall be followed

until all employees in lay-off status have been given an opportunity to return or until an employee shall have been in lay-off status for two years, upon the expiration of which his plant seniority shall terminate.

August 15, 1974

JOB BIDDING PROCEDURE

Probationers

Temporary employees with less than six months company service are not qualified to bid on job openings until declared Permanent employees.

Entry Level

When a permanent opening occurs in an entry level job in any progression line, bid notice will be posted plant wide by the Employment office and in the department for three working days.

Employees within the department in which the vacancy occurs may bid on the posted job vacancy by signing the bid list in the departmental office. Other employees outside of that department may bid on the posted job vacancy by signing the bid list in the Employment Office.

After three working days the two lists will be consolidated by the Personnel Department. From those qualified the bidder with the longest plant service will be declared the successful bidder.

The bid notice will give department, job title, pay group, and estimated number of openings, plus a brief description of job requirements, skills required, prerequisite experience or training, and any job related skills that must be demonstrated.

Any job vacancies that cannot be filled from plant wide bids may be filled from the preentry group, labor pool, or new hires.

Exceptions

Apprenticeships, Working Foremen positions and Leadmen positions shall be excluded from the bid procedure and normal progression seniority system. Because of their special qualifications, certain jobs of a confidential or technical nature or vital to product quality shall be listed as excluded jobs and shall be excluded from the bid procedure and normal progression seniority. Those interested in any of these excluded jobs should make application to the department office and the Personnel Department providing all information on special qualifications.

Those in excluded jobs may bid for or be promoted to higher jobs in the progression line in line with their qualifications and seniority.

Advanced Entry Jobs

An advanced entry job is defined as a job of higher pay group than regular entry level jobs on which an employee may enter into a department or an advanced stage of the line of progression. In order for an employee to enter in one of these advanced entry jobs evidence must be produced that indicates the employee has had the prerequisite training and is qualified. Advanced entry jobs are as follows:

Monocast Department ..	Mold Machinist and Welder
Steel Cast Department..	Toolman
Machine shop	Radial Drill Operator
Electrical Department ..	Machinist
Construction Department	Roof and Drainman
....	Heavy Equipment Operator
Shipping Department ...	Tractor Trailer Operator

More Than One Job in Box

In those cases where several jobs of relatively the same earnings are placed in the same box in a line of promotion all such jobs are considered as one job for seniority purposes. The incumbents of all such jobs are considered as occupying the immediately preceding occupation to a vacancy in an occupation immediately above the box or connected laterally to the box.

Where one job is boxed separately from a group of jobs in a larger box, only those employees who are on the separately boxed job or have had satisfactory prior experience on this job may move in the line of progression connected to the separately boxed job.

Preentry Group Jobs

In the larger production departments a number of Preentry base jobs are included in a Preentry Group box.

Any employee within the Preentry box who would prefer another job within the box may indicate such a preference on a Job preference form in the departmental office. Whenever that job becomes open it will be awarded to the employee in the Preentry box with the most plant seniority who has requested the job on a Job Preference form, provided he is physically able and qualified to perform the job. An employee is eligible for one such Job Preference award a year.

Permanent employees in a Preentry Group box may bid on entry level jobs in any progression line above the box or plant wide bid openings in any other department.

August 15, 1974

RULES FOR UPGRADING AND CHANGING WAGE RATE JOBS

1. Whenever a successful bidder or one promoted in the progression line fails to show satisfactory progress and performance toward learning the job during the 30 working day trial period and must be removed from the job, or whenever a successful bidder or one promoted in the progression line asks to be taken off the job during the 30 working day trial period, he shall be returned to his old job if it has not been filled. If his previous job has been filled, he shall be assigned to another job carrying the same rate as his old job if such a job is available. If it is not, then he shall be placed on the next job available and his rate reduced to the job rate at the beginning of the next estimate.

2. Whenever business conditions make it necessary to remove a shift in a department within one year of its addition, employees will return to lower jobs held before the shift addition. Employees with the least experience in the progression line will be reassigned to other departments that need additional manpower. The rate of pay for those reassigned to other departments will be the job rate to which they are assigned. These rate adjustments will be made at the beginning of the next payroll estimate after the date of reassignment.

3. Whenever it is necessary to remove a shift or curtail operations in a department after one year or more, at that level of operation, the excess employee or employees at the highest job level in the progression line with least plant seniority will be moved to successively lower levels in the line of progression. If a department has more than one progression line with similar skills, an employee displaced from one progression line will have seniority rights in another progression line with similar skills in the department toward a job of comparable rate or a next lower rate job available, if he is qualified and physically able to perform the job. Employees who must leave the department will be those displaced from the progression lines with least plant seniority. Those leaving the department will be placed in other departments if manpower is needed, and their rates adjusted to the jobs filled.

4. When an employee with long service is declared by an Acipco doctor to be limited in physical activity due to shop accident or illness, a job opening that fits the employee's physical limitations may be filled first by the physically impaired employee before promoting up the progression line or posting for bids. If an opening occurs within the department that fits the physical limitation of long service employee it may be filled with such employee by the Department Head. If necessary to move to another department to fill a job opening that fits the physical limitation, it will be done by the Personnel Department and Works Manager.

5. When an employee has been removed from a department because of a reduction in work load, and has been permanently reassigned to another department, he shall have the right on one occasion to return to his old progression line if an opening occurs within two years of his permanent reassignment. He shall have return rights to his old job over new hires and bidders from outside the department.

6. If a certain high level job is eliminated from a department due to changing business trends or a deep reduction in force in that department and an opening for that job skill occurs in another department, the opening will be filled with the employee with the displaced skill before opening the job for bids, or moving up a less qualified employee in the progression line. Placement of employees with displaced

skills will be done with approval of the Seniority Committee.

7. If the work load in a department decreases making it necessary to reduce manpower, temporary assignments of employees may be made from one job to another and from one department to another. However, any temporary job assignment that extends beyond 60 calendar days will automatically become a permanent assignment or transfer. The employee's rate of pay will be adjusted to the job rate to which he is reassigned, on the beginning date of next payroll estimate, following his 60 day period on the reassigned job.

8. If higher level jobs are reduced or eliminated from a department due to technological improvements or permanent reduction in demand, the displaced employees may be assigned in order of plant seniority to comparable rate jobs or the nearest jobs below which they have worked before and are able and fully trained to perform. If the reduction goes beyond normal openings, some shifting back of jobs may be necessary to protect job rates of employees with long service.

9. Temporary job assignments may be made to cover for employees who are off from work because of illness, vactation, jury duty, leave of absence, etc. Employees will be expected to temporarily work higher jobs in the progression line as a part of their training for the higher jobs. The rate of any employee filling such a temporary job assignment shall not be altered as a result of working the temporary job a period of up to 30 working days. If the temporary assignment extends beyond 30 working days, then the employee's rate who is working the job shall be temporarily increased to the rate, or toward job rate according to the rate progression schedule if his permanent rate is below the rate

of the job. If his permanent rate is above, no change shall be made in his rate as a result of the temporary assignment. Such temporary transfer may continue until the employee off from work returns to work or a decision is made that the job be filled permanently. If within a year an employee has filled in on a higher rate job several times for intervals of one week or more equivalent to a cumulative total of 30 work days, his rate will be temporarily increased to job rate or along the rate progression schedule. If an employee has received the temporary rate after 30 days, and the sick employee returns to his job and rate, but later within a year is off again the employee who filled in previously shall be given the temporary rate immediately if for a period of one week or longer.

10. Whenever an employee is assigned to a job temporarily and the job subsequently comes open for promotion, the experience gained while on the job temporarily shall not be considered eligible experience toward any experience requirement if such experience would place a junior employee over a senior employee who is otherwise qualified.

11. Whenever an employee is a successful bidder, he should be moved to the job within 30 working days. But if circumstances cause a delay he shall be notified of the reason. If job circumstances change to eliminate the opening, the bid will be voided and notice posted.

12. When a job becomes open on a permanent basis and in the interim must be filled temporarily, such temporary assignment shall not exceed a period of 60 working days unless an exception is made by the Works Manager.

13. Those jobs which are critical to product quality, safety and/or efficiency of operations are designated as "critical jobs" in the lines of progression by small circles on the box around the job title. In restoring shifts following a

plant lay-off or departmental cut back the same experienced employees would return to these critical jobs in the same positions relative to each other that existed prior to the plant lay-off or departmental cut back. Under conditions requiring a shift reduction and/or departmental cut back employees fully trained on critical jobs with special skills essential to product quality, safety and/or efficiency of operations will be retained in progression line. Under conditions requiring a plant lay-off, management may require that employees fully trained on certain critical jobs with special skills essential to product quality, saftety and/or efficiency of operations be retained and these will be subject to approval of the Seniority Committee.

14. Filling: "A" Craft Openings: Apprenticeships are offered in anticipation of future craft openings and apprentice graduates receive first consideration for craft openings.

    For a craft opening beyond apprentices available, a trainee opening will be available. The qualified candidate next in the job progression line will be lined up to complete necessary training and job progression toward the well rounded job knowledge expected of the craft.

    Graduation to craft rate through the Trainee Program requires a minimum of seven years well rounded experience in the craft or trade plus compliance with the rules governing trainees.

    A Trainee Designate may be advanced one half the rate increment between Pay Group 11 and job rate upon satisfactory completion of six years experience on the job in the skill and then only with approval of the Apprentice Committee.

    A Trainee Graduate may be advanced the remaining one half of the rate increment between Pay Group 11 and the

job rate upon satisfactory completion of seven years experience on the job in the skill, when recommended by the Department Head and approved by the Employment Manager, Personnel Director and Works Manager.

A "Trainee Candidate" is any employee working any of the jobs considered potential training progression steps toward a craft job.

A "Trainee Opening" is an expected craft opening beyond apprentice availability.

A "Trainee Designate" is the senior qualified candidate next in the progression line who has been designated for completion of training and job progression toward "A" craft.

A "Trainee Graduate" is a trainee designate who has completed the seven years minimum experience, has the well rounded training required, has the approval of the Apprentice Committee, and has complied with any special rules for the craft. He is entitled to the rate and job responsibilities of the craft.

The number and ratio of "A" craft jobs must be approved by the Works Manager and Personnel Department.

An employee cannot move beyond Craft "B" until an opening for Craft "A" has been approved or a vacancy has occurred.

Rate increases on trainee craft candidates will be initiated by the Department Head, if an employee has made expected progress in development of skills and broad experience expected of the craft. If expected progress has not been made, the employee's rate will be held to the level commensurate with his ability.

15. Within a department a lateral bid type mechanism may be used for employee expression of departmental job pref-

erence where a few designated jobs have some attractiveness for employees with long service and/or health limitations. These jobs known as and traditionally designated as "lateral bid" jobs are not a part of the upgrading progression system. No rate increase is involved. All applicants must be on the job classification and fully qualified. The bidding mechanism merely expresses preference for type of work within the job classification.

16. Bid sheets remain valid for 30 working days after a job has been filled. If the first successful bidder asks off or must be removed from the job, the next qualified senior bidder may be awarded the job without rebidding.

17. Whenever a successful bidder has been removed from a job because of failure, he must show evidence he has obtained training, attended classes, or improved his skill before being considered a qualified bidder on the same job or one requiring the same basic knowledge and skill level.

18. If an employee is awarded a bid requiring a departmental transfer, and before being placed on the job he requests to cancel his bid, he may be required to take the job until replacement has been obtained, if his previous job has been filled. If his previous job has not been filled, he may be released from the bid and not forced to take the job, but his decline will count as a departmental transfer.

19. When an employee has not reached job rate, in Pay Group 9 and above, and his work performance becomes unsatisfactory, the employee will be removed from the job at the discretion of the Department Head. Prior to the removal of the employee from the job, it will be the responsibility of the Department Head to have written assurance that the employee has been adequately and thoroughly counselled, instructed and advised as to his lack of progress during

his period of unsatisfactory work performance while learning the job.

20. When an employee has reached job rate and his work performance becomes unsatisfactory, the employee can be removed from the job upon recommendation of the Department Head and with the approval of the Seniority Committee. Reassignment will be as follows:

    The employee shall be returned to his old job if it has not been filled. If the old job has been filled, the employee will be assigned to another job carrying the same rate as his old job, if such job is open. If such job is not available then the employee shall be placed on the next job open and his rate will be reduced to the job rate at the beginning of the next estimate.

    Whenever a Foreman or Leadman requests or is requested to come off a supervisory job, he may return to the job previously held if open. If not open then he will be assigned to the nearest job rate open in the progression line in line with his seniority. His rate will be adjusted to the job rate. If a Foreman or Leadman job is eliminated in a cut back or shift reduction, he returns to a former job in the progression line and resumes his seniority position in the line.

21. Whenever a successful bidder has been moved to the job and later decides he wants to return to his previous job, he may be required to hold the job six months to justify the cost of moving and training.

22. In case of reduction of force in a department requiring craft jobs or specialized skills, apprentices, craft trainees, or specialists who have completed half their training, shall be retained in the department over employees under Pay Group 10 will less than ten years service if their skill is deemed by Management as essential to the future of the department.

23. Whenever an employee is removed from a department because of a reduction in force, and an opening occurs in that department within two years, he shall be given one opportunity to return to that department before filling the job.

24. A number of plant general laborers may be employed and assigned temporarily by the Personnel Department to departments like General Yards, Construction, Shipping, etc. They may be used in any department to fill a temporary need.

    When a permanent opening occurs in any department for a new hire, one of the Labor Pool temporary employees may be sent to the opening, if qualified, on the same basis as a new hire.

    If a Labor Pool employee should remain in the Labor Pool beyond probationary period he may bid on job vacancies posted plant wide.

25. An employee who has taken special courses which are job related to the work involved will be given qualification credit for completed ICS units, Acipco Night School, college or trade school courses. Credit for any other job related training may be recommended by the Training Director and approved by the Seniority Committee. Evidence of certificates or satisfactory grades and progress must be on record in the Personnel Department before the time of bidding or applying. (Guidelines are attached.)

26. An employee who gained job related experience in the military or previous employment will be given qualification credit for that experience for advancement openings within the department and for employees seeking to enter the department. Amount of credit will be determined by the Department Head with approval of the Personnel Department.

27. On any job bid an employee will be given qualification demerits equivalent to two years seniority if he has on record a disciplinary lay-off or two reprimands within the last year and after March 18, 1974 on the following violations of Plant Rules affecting job performance: No. 4, assault; No. 5, assault with threatening or abusive language or gestures; No. 6, disobedience; No. 9 and No. 10, malicious damage and carelessness causing damage; No. 12, quitting work, sleeping, etc.; No. 15 and No. 16, intoxicants; No. 18 and No. 19, safety; No. 21 loafing; No. 22, tardiness; No. 23, absenteeism; No. 34, horseplay.

August 15, 1974
Changes 2/3/75

GUIDELINES QUALIFICATION CREDIT FOR TRAINING AND EXPERIENCE

For the sake of uniformity in evaluating credit for training and experience of those bidding for higher skilled jobs, the following guidelines have been agreed upon.

Among bidders for a higher skilled job, six months qualification credit will be allowed for satisfactory completion with a passing grade of—

Six units of completed ICS study.

One Acipco Night School course.

*Six months accredited vocational trade school.

One year of college if applicable.

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* Since Trade Schools vary widely, credit will depend on quality of course and school. Credit indicated is for the best recognized and accredited vocational schools. Less credit can be allowed for less comprehensive courses as evaluated by the Training Director and the Personnel Department.

Other type courses may be considered equivalent if recommended by the Training Director and approved by the Seniority Committee.

For qualification credit, courses must be directly and fully applicable to prerequisite training requirements for the job.

The course must be up to date and more advanced than the job already being performed.

To receive credit, certification of satisfactory completion must be on record in the Personnel Office before the posting of the job bid.

Experience credit granted for previous experience in military service or another plant may be full credit if considered to be fully and directly in line with prerequisite training for the job. Fractional credit may be given if considered only partially in line with training needed for the job or if below some of the skills learned on present job.

Department Heads have the responsibility to determine qualifications and prerequisite training for jobs in their department and whether training courses are applicable to job qualification.

Any questions or uncertain interpretations about accredited courses or relative qualifications of applicants will be settled by the Seniority Committee.

RATE ADJUSTMENT POLICY

1. An employee who bids for or requests and receives a lower rate job will go to the rate of the new job the next pay estimate after going on the job. An employee who fails on a higher job and must return to a previous job will go to the rate of the job to which he is returned on the next pay estimate.

Exception will be made according to Court decree for Black employees employed before February 14, 1968, who bid into another department or progression line to a lower rate job and qualify for rate retention under the Court decree. Souch an employee's rate will not be cut until he has progressed to a job of equivalent rate, or unless he fails or declines to progress or bids into another department or progression line as provided in the Court decree. Rate retention lasts for 104 weeks next following the transfer with rate retention and this exception expires three years after the date of the Decree.

2. Whenever reduced business makes it necessary to reduce manpower in a department, those with least seniority who leave the department and are assigned to another department will go to the rate of the new job at the next estimate.

3. Whenever by reducing shifts or any curtailment the number of higher rate jobs in a department are reduced, those employees with less seniority who must shift down to progression lines to lower rate jobs will go to the rate of their new jobs on the next pay estimate after the change is declared permanent or at the end of a 60 calendar day temporary period, whichever first occurs.

4. Whenever, due to job evaluation, reduced responsibility, or any reason, the rate on a job is reduced, those employees on the job and at the rate at the time will not have their rate reduction so long as they are on the job, but will be placed on a special "red circle" *over the rate status*. Whenever higher rate jobs are reduced or eliminated by technological or equipment changes, employees at rate on these jobs who are relocated on other jobs will not have their rate cut but will be placed on red circle over rate status. Employees on red circle over rate status will be given priority on job openings equal to or nearer to their over

rate. Whenever an over rate employee declines to accept or fails on a job opening equal to or approaching his over rate, he loses his over rate status and goes to the rate of the job held.

5. Employees with 30 years service and 10 years at present job rate who are forced by health limitation to take a lower rate job will not have their rate cut but will remain on a red circle over rate status. The health limitation must be declared by a company doctor. All employees on red circle over rate are subject to Management approval and review.

6. An employee within five years of pension age, who, for health reasons, takes a lower rate job will have his pension based on earnings for the highest five years within the last ten years of his employment next preceding his retirement.

7. Whenever a general rate increase is given, employee on red circle over rate status will be given that part of the increase that the new job rate of their present job exceeds their individual red circle over rate, except as otherwise provided in the Court decree.

INSPECTION DEPARTMENT—JOB PROCEDURES

Because of the special critical nature of inspection work and the smallness of the department, it is important to have flexibility of training, and it is necessary that employees on the entry level jobs have the qualification potential to move up to the more specialized jobs whenever needed and sufficient experience has been acquired.

For these reasons it is not practical to fill Inspection Department openings from plant wide bids.

FILLING OPENINGS—INSPECTION DEPARTMENT

Employees interested in jobs in the Inspection Department should make application in the Personnel Department. Applicants will be required to demonstrate required knowledge for inspection jobs.

A job related test will be given answering questions, measurements, and decisions faced in inspection work. Major consideration must be given to the special qualification for inspection work.

When an opening occurs, the superintendent of the Inspection Department will establish with the Personnel Department the necessary qualifications for the job opening and select the most qualified candidate.

Whenever an opening occurs and two or more applicants have similar qualifications and test scores, the job will be given to the employee with the longest plant seniority.

DEPARTMENTAL REDUCTION—INSPECTION DEPARTMENT

Employees in the Inspection Department will be rated into two classes.

1. Limited ability—limited to lowest level jobs only. (An employee may be limited either because of lack of speed or lack of knowledge and versatility.)
2. Versatile ability in several jobs.

In the event of reduction of forces in the Inspection Department, those in Limited classification will be the first to leave the department in the inverse order of their plant seniority of they have been in the Inspection Department one year. Any who have been in the Inspection Department less

than one year will leave in the inverse order of their time in the department or progression line.

Next to leave the department will be those in Versatile classification in the inverse order of their plant seniority.

Last to leave will be those who have qualified on Critical jobs according to plant seniority.

RETURN RIGHTS—INSPECTION DEPARTMENT

Under conditions of a departmental cut back, those who leave the Inspection Department with a Limited rating will not be eligible to return when opening occurs in the Inspection Department. Those who leave the Inspection Department with a Versatile rating will be eligible for one opportunity to return until two years after leaving, in line with general policy.

APPENDIX B

Judgment of the District Court for the Northern District of Alabama Entered June 12, 1975.

In the United States District Court for the
Northern District of Alabama
Southern Division

Rush Pettway, et al.	Plaintiffs	Civil Action No. 66-315
v.		
American Cast Iron Pipe Company,	Defendant	

Judgment

Filed June 12, 1975)

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. **Class Action**—The Court confirms its conclusion heretofore entered in this action that this action is due to be maintained as a class action for a class composed of all black employees of the defendant Company employed at its Birmingham plant prior to May 14, 1975, the Court finding that in this action the prerequisites of Federal rule 23(a) are satisfied and that in addition the provisions of Rule 23(b)(2) are applicable.

2. **Back Pay**—Pursuant to the reservations contained in Section 15-B of this Court's decree of May 14, 1975, the Court has further considered the methodology to be applied in the computation of back pay. Counsel for the parties have submitted memoranda with supporting data advocating their respective positions together with oral argument to the Court. In general terms, plaintiffs' position is that back pay ought to be determined by the difference in black-white pay for employees of the same or comparable seniority, i.e., the comparability

formula. Defendant, on the other hand, argues for an individual-by-individual approach, i.e., trace each class member's work history and award him for purposes of back pay computation every higher job to which his qualifications and seniority would have entitled him (with some restrictions and limitations not here necessary to delineate). As the Fifth Circuit Court of Appeals indicated on its remand of this case, the determination of a just and reasonable amount is at best "a hypothetical quagmire." The Court has carefully examined the varying contentions of the parties, has adopted some elements of each, and has determined therefrom that 833 black employees have been identified by the Company as constituting the class of black employees heretofore designated by the Court as those entitled to be considered for an award of back pay and that the aggregate amount of back pay, including interest to December 31, 1974, computed as directed by the Decree entered herein on May 14, 1975, totals $907,222.18. However, the Court has further determined that while the gross amount of back pay so calculated is fair and reasonable back pay compensation to the class of black employees entitled to back pay it should properly be adjusted for the average bonus of nine and a fraction percentage paid by the Company over the nine and one-half years covered by the calculations and should be further adjusted to cover interest accrued from January 1, 1975 to the date of this judgment and when so adjusted the aggregate amount of back pay would equal One Million Dollars. The Court has further found that by reason of certain arbitrary assumptions contained in the Court's prior directions for calculating back pay and also by reason of the omission of certain factors which should be given some consideration in determining economic loss but which were omitted from the Court's calculations directions because of ensuing calculation complexities, such back pay calculations have produced widely and unjustifiably disparate results and, when viewed individual by individual, are not equitable. Consequently, the Court in the exercise of its

discretion and in order to effect justice and equity among the members of the class of employees entitled to back pay has directed the Company to allocate the aforesaid award of One Million Dollars among the 833 black employees entitled to share therein on the following basis: An initial amount of $100.00 is first to be allocated to each such employee and the balance of $916,700.00 is to be allocated among such employees in accordance with the following formula: The Company shall determine for each such employee the number of points each has attained by multiplying his completed years of active service with the Company as of June 1, 1975, or as of the date the employee became inactive, if earlier, by the pay group of the highest job successfully performed by him as of February 10, 1975 and multiplying the product so obtained by a fraction of which the numerator is the number of complete months the employee was in the active employ of the Company subsequent to July 2, 1965 and the denominator is 119 which is the number of months expiring between July 2, 1965 to June 1, 1975. Each such employee shall have allocated to him such portion of $916,700.00 as the number of points so calculated for each such employee bears to the aggregate of the points so calculated for all 833 employees and each such employee's back pay award is to be such portion increased by the $100.00 initially allocated to him pursuant to the foregoing directions. The Company has made the reallocation above directed and a tabulation thereof is attached hereto as Appendix I and made a part hereof as if set out herein in full. Judgment is hereby entered against the Company and in favor of the class members listed in Appendix I, and the Company is directed to pay to each such class member listed on Appendix I, the amount shown thereon opposite the class member's name and badge number, such payments, however, being subject to deduction for employment taxes and withholding as may be required by applicable law. All claims for back pay except as provided in this paragraph are denied. The awards

of back pay herein provided are in full satisfaction of all claims of any class member listed in Appendix I for lost wages, overtime, vacation pay, holidays, fringe benefits, bonus participation, and interest to the date of this Decree, and it is hereby directed that no bonus under the Company's bonus plan shall be currently declared or paid upon the awards of back pay contained herein. However, the amount of back pay paid to a class member pursuant hereto shall as to those class members currently employed be treated as additional current earnings as of the date of its receipt for pension calculation purposes under the Company's pension plan and shall as to those class members presently on pensions be treated as additional compensation for and shall be incorporated into such class member's pension calculation base for the purpose of determining such class member's monthly pension payable in the future beginning with the first full calendar month next subsequent to the month in which such back pay award is paid to such class member.

3. **Release**—The Court approves as complying with Section 15-D of the Decree dated May 14, 1975, the Company imprinting on the back of its checks used in paying the back pay awarded by this Judgment the words, "I understand that my endorsement of this check constitutes a release of liability in the form specified in Paragraph 15-D of the Decree dated May 14, 1975," and such endorsement shall for all purposes bind the endorser the same as if the endorser had executed a written release containing the terms and provisions expressly set out in said Paragraph 15-D of the Decree of May 14, 1975.

4. **Lines of Progression Modifications**—Attached hereto as Appendices II through VIII and made a part hereof by reference are revised lines of progression in the following departments: Mono-Cast, Foundry, Melting, Steel Foundry, Machine Shop, Construction, and General Yards, and said revised lines are hereby substituted, effective with the date of this judgment,

for the comparable lines of progression contained in Appendix C attached to the Decree herein dated May 14, 1975.

5. **Reporting**—Within thirty days after June 1, 1976 and annually thereafter during the duration of this Decree the Company shall file with the Court and a copy to plaintiffs' counsel the following reports:

A. **General**—(1) A breakdown of all employees showing the number of employees, by race, within each department and each job title as of the end of the reporting period; (2) a breakdown of newly hired employees and terminated employees, by race, within each department by job title, the date of termination, and the reason for termination for the year covered by the report.

B. **Bidding, Promotions and Transfers:** (1) Information shall be provided on all "notices of bidding" including job title and department, date of posting, number of openings, and the name, badge number, race, present job title, plant seniority date of all individuals who bid on the posted jobs and an indication of the successful bidder or bidders; (2) Where a promotion or transfer is not granted to a member of the affected class and he had the greatest amount of plant seniority of employees competing or otherwise under consideration for the posted job, the reasons in nonconclusory terms for his non-selection shall be furnnshed.

C. **Promotions to Supervisory Positions:** (1) A listing by name, badge number, race and plant seniority date of all employees being considered for promotion to supervisory positions and the identity of those who were selected for supervisory positions during the reporting period: (2) A detailed explanation of the reasons for rejection of any black employee considered and rejected for promotion to a supervisory position.

D. **Other Information:** The Company shall furnish to the Court and to plaintiffs' counsel any other information relative to the matter of its compliance with provisions of its Decree.

E. **Access to Plaintiffs' Counsel:** The Company shall afford Plaintiffs' Counsel reasonable opportunity to examine and copy all records, application and other documents relevant to the Company's compliance with the Decree of May 14, 1975, and with this Judgment and shall also afford Plaintiffs' Counsel reasonable opportunity to inspect the Company's Birmingham Plant or such part thereof as may be relevant to any alleged act of noncompliance of the Company with any provisions of the Decree of May 14, 1975 or of this Judgment.

6. **Cost and Attorneys' Fees.** The defendant shall pay to plaintiffs' counsel the sum of $220,000, less the $30,000 interim payment heretofore made, as attorneys' fees for legal services furnished by them to the plaintiff class, for expenses incurred therein and for any court cost not heretofore taxed against and paid by the defendant.

7. **Order Under Rule 54(b).** The Court now under Rule 54(b) expressly determines that there is no just reason for delay and expressly directs that the judgment as contained in the Decree of May 14, 1975 and this Judgment be entered as a final judgment as against all parties.

DONE this the 12th day of June, 1975.

/s/ SEYBOURN H. LYNNE
United States District Judge

(Appendices attached to original judgment have been omitted in printing. A copy of the omitted appendices has been lodged with the Clerk of this Court under separate cover.)

APPENDIX C

Final Order and Modified Judgment of the District Court for the Northern District of Alabama Entered November 20, 1975

United States District Court
Northern Division of Alabama
Southern Division

Rush Pettway, et al.,
Plaintiffs,
vs.
American Cast Iron Pipe Company,
Defendant.

Civil Action
No. 66-315

Final Order and Modified Judgment

(Filed November 20, 1975)

Following an evidentiary hearing in open Court on October 30, 1975 and a further hearing in chambers on October 31, 1975, this action was submitted to the Court on all pending written and oral motions not heretofore disposed of, and the Court having considered all of the evidence adduced in this action, including the evidence adduced at the prior trials in this action and the Court having considered arguments of counsel, the Court is of the opinion that all pending written and oral motions are due to be denied but that the Judgment entered by the Court on June 12, 1975 is due to be amended and modified as more particularly described hereinafter.

In fashioning the Decree entered herein on May 14, 1975 and the Judgment entered herein on June 12, 1975 the Court, consonant with the opinion handed down by the Fifth Circuit Court of Appeals on April 29, 1974, reviewed with the parties in a series of informal conferences the defendant Company's promotion, transfer, job bidding, layoff, recall and other employment practices and communicated to the parties prior to the entry of Decree and Judgment the Court's essential find-

ings and conclusions which are accurately summarized and made part of the record in this action by the Stipulation of the Parties filed in Court on October 30, 1975. The Court finds and concludes from all the evidence:

(a) That business necessity had been shown and established for the basic principles involved in the line of progression concept used in and governing the structure of the Company's various lines of progression, charts of which are attached as Appendices to the Decree of May 14, 1975 and the Judgment of June 12, 1975;

(b) That business necessity has been shown and established for the Company's revised promotion, transfer, layoff, recall and other employment practices collectively referred to as Seniority Rules and Regulations attached as Appendix B to and approved in the Decree of May 14, 1975;

(c) That the one year waiting period before plant age may be used by a new entrant into a line of progression for promotional purposes is necessarily required to insure a minimum period of training and experience before rising to more responsible positions in the line of progression and thereby avoiding a significant hazard to personnel and equipment and a substantial adverse effect upon the efficiency of the operation conducted by the line of progression;

(d) That the removal of pre-entry group jobs from the Company's lines of progression and the identification of advanced entry jobs together with the provision for filling vacancies in entry level jobs and advanced entry jobs through plant-wide bidding using plant seniority properly and adequately afford promotional and transfer opportunities to eliminate any continuing

effect of past discrimination consistent with business necessity of the Company;

(e) That the rate retention provision set out in paragraph 7 of the Court's Decree of May 14, 1975 properly and adequately encourages and protects the earnings of any black employee who takes opportunity to transfer to a new line of progression in another department from which he may have been inhibited or restricted by the Company's test and educational requirements existing prior to February 18, 1968 but at the same time protects the Company against loss of efficiency and needless waste of training time and cost which would result if black employees occupying and enjoying the pay of the semi-skilled and skilled jobs in pay groups above pay group 8 were encouraged to transfer out of those jobs by unrealistically high rate retention;

(f) That business necessity has been shown and established for the basic principles incorporated in the Company's apprenticeship program and in its on-the-job training program as modified by paragraphs 8 and 9 of the Decree of May 14, 1975;

(g) That business necessity has been shown and established for selecting personnel for promotion to supervisory positions from those incumbents on the one or two top jobs in a line of progression in order to obtain a supervisor with requisite skills and technical knowledge needed to supervise and direct the work under such personnel's supervision and that qualified black employees are being selected for supervisory positions without regard to race, the Company having fourteen black foremen and leadmen as of January 1, 1975 as compared to only two in 1971.

Additionally, in line with the mandate of the Fifth Circuit Court of Appeals the Court, in its Decree of May 14, 1975, made provision in paragraph 11 for an appropriate grievance procedure and in paragraph 12 for an Implementation Committee which is drawn equally from the Board of Operatives and from the plaintiffs and which is charged with the responsibility of taking all steps necessary to monitor compliance with the Court's Decree including oversight of Decree-related grievances. The Court is satisfied from all the evidence in this case that its Decree of May 14, 1975 and its Judgment of June 12, 1975 are appropriate under all the circumstances and comport with the mandate of the Fifth Circuit and that the Decree of May 14, 1975 and the Judgment of June 12, 1975 should, at least at this time, remain unaltered and unmodified except, however, in the one area hereinafter more particularly set out.

In regard to back pay for black employees of the Company who may have suffered some economic loss due to discrimination subsequent to July 2, 1965, the Court finds from the evidence and concludes that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any other alleged discriminatory practice. On the other hand the Court found and concluded that a class of black employees of the Company who were employed prior to July 2, 1965 and who either were still in the active employment of the Company as of the date of the Court's Decree and Judgment or who had left the employ of the Company prior to the date of the said Decree and Judgment with at least one year of service with the Company may have suffered some economic loss due to alleged discriminatory practices of the Company. The Court in paragraph 15 of its Decree of May 14, 1975 directed the Company to make back pay calculations on an individual-by-individual basis for that class of employees in accordance with the back pay calculation formula set out in said paragraph but subject

to further review by the Court. Thereafter, on its review of the individual calculations, the Court, as is set out in its Judgment of June 12, 1975, concluded that while the gross amount of the award of the calculated back pay with interest when adjusted as indicated in the Judgment of June 12, 1975 amounted to One Million Dollars ($1,000,000) which the Court found and concluded as constituting a reasonable approximation of the aggregate economic loss which may have been suffered by that class of black employees due to any racially discriminatory practices of the Company. However, the Court further found and concluded that, when viewed on an individual-by-individual basis, the widely disparate results among members of the back pay class were inequitable and that the gross amount of the back pay awards so determined should be reallocated among the back pay class members on another and equitable basis. Thereafter the Court adopted the reallocation formula set out in paragraph 2 of its Judgment of June 12, 1975 which resulted in the individual back pay awards set out in Appendix I of said Judgment for the 833 members of the class determined by the Court to be entitled to back pay consideration. While the Court deems those individual back pay awards to be fair, equitable and adequate, the Court is also aware that certain individuals in that class have expressed dissatisfaction with their individual awards and have declined to accept payment thereof. Since the individual back pay awards were arrived at through negotiations between the parties at the urging of the Court and are in the nature of a consent settlement the Court is of the opinion and concludes that any individual who has not yet cashed the Company's check tendered to him in payment of his award should be given an opportunity to waive his back pay award by a day certain and thereafter to pursue by independent action his individual claim for back pay due to any economic loss alleged and proven by him to have been suffered by him as the result of some racially discriminatory practice on the part of the Company, free of the defense of res judicata or col-

lateral estoppel insofar as his individual back pay claim is concerned.

Now therefore it is ORDERED, ADJUDGED and DECREED as follows:

1. The back pay awards set out in Appendix I to the Judgment of June 12, 1975 be and the same are hereby modified and altered in the following respects:

(a) The individual back pay awards set out in Appendix I to the Judgment of June 12, 1975 are made conditional upon the acceptance of payment thereof by December 15, 1975 and any individual award not accepted by the awardee by December 15, 1975 shall become, as of 12:01 A.M. December 16, 1975, null and void and of no more force and effect.

(b) Each back pay awardee, who has not accepted payment of his back pay award and signed the form of release set out on the Company's check tendered in payment thereof by the time specified in (a) above, shall, thereafter, have the right to assert and pursue his claim for back pay allegedly due to economic loss suffered him as a result of racial discrimination against him by the Company in an independent action against the Company in which action the individual claimant shall have the burden of establishing his alleged economic loss due to racial discrimination on the part of the Company and the Company shall have the right to offer all defensive matter available to it except the defense of res judicata or collateral estoppel predicated on the original entry of the waived back pay award and further the Company shall not be bound or estopped by or in any way prejudiced in its defense against any individual back pay claim by virtue of any provision relating to back pay contained in the Court's final Decree of May 14, 1975 or in the Judgment of June 12, 1975 or by virtue of any position advanced by the Company in the negotiations leading up to the back pay awards contained therein.

(c) The Company is hereby directed to send forthwith and not later than November 21, 1975 by U. S. Mail, postage prepaid, at the last known resident address according to the records of the Company a notice to each person who was awarded back pay in Appendix I of the Judgment of June 12, 1975 and who has not accepted the back pay awarded to him by cashing the Company's check issued in payment thereof and executing the release contained on the back of said check a notice in the following form, a copy of which shall be posted on the Company's bulletin boards at its Birmingham plant for a period of forty-five days from the date hereof:

"To All Employees Who Were Awarded Back Pay
in the *Pettway* Case and Who Have Not Yet
Accepted Payment Thereof"

"According to the Company's records you have not as of this date cashed the Company's check and executed the release contained on the reverse side of said check issued to you in payment of the back pay awarded to you by the Judgment entered by the United States District Court on June 12, 1975 in the case of ***Rush Pettway, et al. v. American Cast Iron Pipe Company***, CA No. 66-315. You are hereby notified that by Final Order and Modified Judgment entered on November 20, 1975 the U. S. District Court has altered and modified its Judgment of June 12, 1975 to provide that if you have not cashed the Company's check issued in payment of the back pay awarded to you by that Judgment and have not executed the release on the reverse side of said check by December 15, 1975 the back pay awarded to you by that Judgment will at the end of that day become null and void and of no more force and effect, but you will have the right thereafter to bring an independent action against the Company for whatever back pay you claim you have suffered the loss of due to racial discrimination against you on the part of the Com-

pany and the Company will have the right to assert against your claim any defensive matter available to it the same as if there had never been the entry of the back pay award in your favor in the *Pettway* case. You are further advised that the legend imprinted on the face of your check "NOT VALID AFTER 120 DAYS FROM DATE" has been waived by the Company and you should have no difficulty in cashing that check at the bank on which it is drawn if you decide between now and December 15, 1975 to accept payment of your back pay award.

By Order of the Court, the 20th day of November, 1975."

(d) The Company is directed to file with the Clerk of the Court as soon after December 15, 1975 as feasible a certified list of those persons who were awarded back pay by the Judgment of June 12, 1975 and who have failed to accept payment of said back pay award by December 15, 1975, and, upon receipt of the certified list, the Clerk of the Court shall enter a Judgment setting aside and annulling as of December 16, 1975 the back pay award made in this action to each individual named in said list.

2. All pending motions are hereby overruled and denied, including but without limiting the generality of the foregoing the following:

(a) Plaintiffs' objections to the Decree of May 14, 1975 and the Judgment of June 12, 1975 and Motion for Reconsideration filed pro se on June 20, 1975 containing some seven hundred plus signatures;

(b) Motion to Alter, Amend and Stay Judgment or in the Alternative for a New Trial filed on behalf of the plaintiffs by attorneys Robert L. Wiggins and George W. Harris on June 23, 1975;

(c) Motion of Oscar W. Adams, Jr. and the law firm of Adams, Baker and Clemon filed June 24, 1975 to strike the paper filed by Wiggins and Harris on June 23, 1975;

(d) Motion of attorneys Wiggins, Strawbridge and Harris for leave of Court to present additional evidence in support of plaintiffs' motion to alter, amend or stay judgment or in the alternative for a new trial filed July 11, 1975;

(e) Motion of named plaintiffs and class members for leave to take depositions of defendants by tape recording equipment filed by attorneys Wiggins, Strawbridge and Harris on July 15, 1975;

(f) Motion of attorney Robert L. Wiggins to compel compliance with the Decree of June 12, 1975 filed July 23, 1975;

(g) Motion of plaintiffs' attorneys to withdraw motion to strike filed by Oscar W. Adams and Adams, Baker, and Clemon on August 4, 1975;

(h) Motion of defendant to strike the paper entitled "Motion to Alter, Amend and to Stay Judgment" filed by Robert L. Wiggins and George W. Harris filed August 25, 1975;

(i) Motion of defendant for citation of contempt and replacement of black members of the Implementation Committee filed August 25, 1975;

(j) Motion of defendant to compel compliance with Court's Decree of May 14, 1975 filed August 28, 1975;

(k) Motion of defendant to set aside back pay awarded to black employees declining promotional opportunities filed August 28, 1975;

(l) Motion of Plaintiffs to strike for untimeliness defendant's motion to strike filed by Robert L. Wiggins on August 29, 1975;

(m) Motion for clarification of Judgment filed on behalf of three named individual plaintiffs and other plaintiffs by Wiggins and Strawbridge on October 7, 1975;

(n) Motion of three named plaintiffs and others for reconsideration of the granting of defendant's motion to strike the notice of appeal filed July 14, 1975 filed by Wiggins and Strawbridge on October 16, 1975;

(o) Motion for leave to commence discovery made orally by attorney Robert L. Wiggins in chambers on October 30, 1975;

(p) Motion for allowance of fifteen or twenty days within which to prepare and file exhibits made orally by attorney Robert L. Wiggins in chambers on October 30, 1975;

(q) Motion to substitute Robert L. Wiggins and his firm Wiggins and Strawbridge as counsel for plaintiff class in lieu of Adams, Baker and Clemon made orally by Robert L. Wiggins in chambers on October 30, 1975.

Done this 20th day of November, 1975.

/s/ SEYBOURN H. LYNNE
Senior Judge

APPENDIX D

Opinion of the Court of Appeals for the Fifth Circuit

Rush Pettway et al.,
Plaintiffs-Appellants,

v.

American Cast Iron Pipe Company,
a corporation,
Defendant-Appellee,

No. 75-4219

United States Court of Appeals,
Fifth Circuit.

July 24, 1978.

Black employees of a pipe manufacturer brought a class action for employment discrimination under Title VII of the 1964 Civil Rights Act and under the Civil Rights Act of 1866. The United States District Court for the Northern District of Alabama, at Birmingham, Seybourn H. Lynne, J., following remand from the Court of Appeals, 494 F.2d 211, approved a proposed settlement and entered an order overruling all motions by dissatisfied class members, and an appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held, inter alia, that: (1) the injunctive relief portion of the district court's decree and the denial of back pay to class members employed subsequent to July 2, 1965, the effective date of the 1964 Civil Rights Act, had to be considered as the court's own judgment, but the back pay award to the subclass was to be treated as a consent settlement; (2) the class representative should have been allowed to prosecute, on behalf of the class, an appeal of the injunctive relief and denial of back pay portions of the district court's decree, considering, inter alia, that a substantial portion of the class supported an appeal on the issue of injunctive relief, and that an appeal from the denial of back pay was obviously in

the best interests of the 1,400 class members who were excluded from the back pay subclass; (3) the district court's approval of the back pay settlement constituted an abuse of discretion, where the active named plaintiffs unanimously disapproved of the settlement, and 70% of the subclass also objected, and (4) the ability of subclass members to opt into the back pay settlement could not be terminated before a final determination of the propriety of that settlement was made.

Affirmed in part, reversed in part, and remanded.

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[The Next Appendix Page Is A-73]

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, AINSWORTH and FAY, Circuit Judges.

GOLDBERG, Circuit Judge:

This complex class action employment discrimination suit, now before us for the fourth time, illustrates the difficulties inherent in judicial efforts to remedy violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by undoing the effects of past racial discrimination in employment. Complaints alleging racial discrimination in employment were first filed with the Equal Employment Opportunity Commission on November 22, 1965.[1] Suit was brought on May 13, 1966 under Title VII and 42 U.S.C. § 1981, and the class was certified pursuant to Federal Rules of Civil Procedure 23(b)(2).

The complaint was dismissed by the district court on March 10, 1967 on the ground that the EEOC had failed to attempt conciliation prior to initiation of the court action. On appeal with several other actions, we reversed. *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969). During the pendency of that first appeal, the defendant, American Cast Iron Pipe Company (hereinafter "ACIPCO") discharged one of the named plaintiffs. That plaintiff then sought and was denied relief in the district court. We again reversed, directing reinstatement and back pay. *Pettway and Wrenn v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

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[1] The Equal Employment Opportunity Commission, the agency established by Congress to administer, interpret, and enforce Title VII, filed a brief as amicus curiae in support of the plaintiffs-appellants. The Commission stated in its brief that "the issues of procedural safeguards to class members and the scope of relief necessary to eliminate employment discrimination are of general importance in the interpretation and administration of [Title VII]."

The district court then addressed itself to the plaintiffs' substantive charges. In 1970 the court examined the racial composition of the Board of Operatives, an advisory board composed of non-supervisory personnel elected by employees of the company. In 1922 the founder of ACIPCO, John J. Eagan, had bequeathed all the outstanding common stock of the company to the members of Board of Operatives and the Board of Management, a body composed of corporate officials elected by the Board of Directors to conduct the day to day business of the company, and their successors in office. The Boards acted as trustees for the benefit of the present and future employees of the company. From 1922 until January, 1970 the membership of the Board of Operatives was explicitly limited to "white" employees. Blacks were relegated to the Auxiliary Board, which was created to advise the other two boards on matters affecting the interests of black employees. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). In 1970 the district court ordered the integration of the Board of Operatives and the abolition of the all-black Auxiliary Board. *Pettway v. American Cast Iron Pipe Co.*, 332 F.Supp. 811 (N.D.Ala. 1970), *aff'd* 494 F.2d 211, 264-67 (5th Cir. 1974).

The employee discrimination charges were tried in October 1971. The district court found that certain testing conducted by the company had an adverse impact on the employment opportunities of black employees and did not pass muster under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Nevertheless, the court denied all requested relief except attorneys' fees and costs. On appeal, we again reversed the district court, and to guide the court on remand, we examined the governing law in a lengthy and detailed opinion. We instructed the court to order back pay to compensate class members for wages lost due to past discrimination and to formulate injunctive relief particularized to the circumstances of the case but as broad in scope as necessary to ensure black employees the opportunity to reach positions in the company previously denied to them by discriminatory

practices. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (hereinafter cited as "*Pettway III*").

On remand the district court encouraged the litigants to engage in settlement negotiations directed toward the fashioning of a decree to carry out the mandate of *Pettway III*. The district judge played an active role in the extensive negotiations which followed. It remains unclear precisely what was resolved during these negotiations. In any event, on May 14, 1975 the court, over the plaintiffs' objections, issued a decree ordering injunctive relief and back pay. On June 12, 1975, after further negotiations concentrating primarily on the issue of back pay, the court issued its final judgment awarding one million dollars to a subclass composed of 841 members (the "back pay subclass")[2] of the 2242 person class.[3] The June 12

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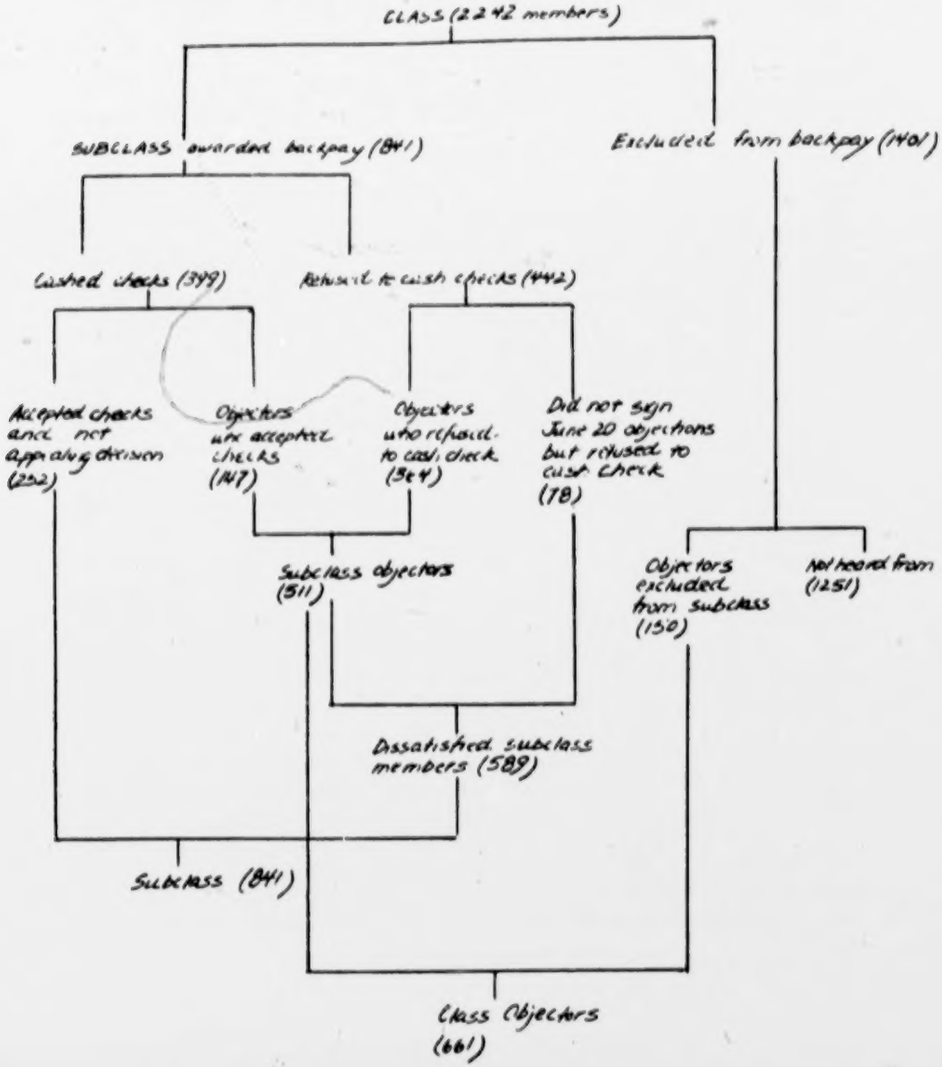
[2] The June 12 final judgment provided that the one million dollar award be divided among the subclass members according to an allocation formula. Following that judgment, the company mailed a back pay check to each individual awardee. The court's November 20 final order provided a mechanism for subclass members to opt into or out of the settlement. Those desiring to opt into the settlement could do so by cashing their checks prior to December 15, 1975. Claimants who were dissatisfied with their award and chose not to cash their checks by that date were considered to have opted out. Their awards were deemed "null and void," and these claimants were relegated by the court's final order to independent back pay actions. For a detailed discussion of the court's opt-in, opt-out procedure, see subsection V(B) *infra*.

[3] The present class comprises 2242 members. Of these, 841 (the "awardees") are also members of the back pay subclass and were sent checks following the June judgment. *See* footnote 2 *supra*. 399 members of the subclass cashed the proffered checks, while 442 declined to do so. The remaining 1401 members of the class were denied any back pay award under the terms of the district courts' May 14 decree.

The parties are in agreement that 661 members of the class (the "objectors") filed objections to the June judgment by signing the June 20, 1975 motion for reconsideration which indicated intent to appeal all aspects of the court's order. The litigants also agree that 147 of these objectors were awardees who cashed the proffered back pay checks. The parties disagree as to the composition of the remainder of the objector group. Appellants and the EEOC urge that all the objectors are members of the back pay subclass; the company

(Footnote 3 Continued on Page A-76)

maintains that 150 of the remaining objectors were excluded from the back pay subclass. We do not view this dispute as decisive of any issue in this appeal and are content, in light of our resolution of the case, to accept the company's statistics. Accordingly, we find that a total of 511 of the objectors (661 − 150) are members of the back pay subclass, 147 of whom cashed their back pay checks and 364 (511 − 147) of whom did not. In addition to these 511 subclass members who objected to the court's decree by signing the notice of appeal, another 78 (442 − 364) subclass members, while not signing the notice of appeal, manifested their dissatisfaction with at least the back pay award by refusing to cash their back pay checks. Thus, a total of 589 (511 + 78) members of the 841 person subclass expressed their dissatisfaction with the back pay award either in writing or by opting out of the subclass. The figures are set forth below in schematic form:



judgment also effected a few minor modifications in some of the injunctive provisions of the May 14 decree.

On June 13, 1975 the active named plaintiffs[4] and a number of other class members requested that class attorney Oscar W. Adams, Jr. appeal the decree and judgment. Mr. Adams informed these class members that he did not intend to appeal. Robert L. Wiggins, Jr., then was retained to file objections to the decree and to prosecute an appeal. On September 5, 1975, the district court denied a motion by appellants to substitute Mr. Wiggins as class counsel and on November 20, entered its final order overruling all motions by the dissatisfied class members. This appeal followed.

The length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece. Last year this court, speaking in retrospect but proving to be prophetic as well, cited *Pettway III* as an example of the time and expense which must be incurred "before the dust of combat has finally settled" in employment discrimination class actions. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Little did we then realize that we were dealing with atomic fallout rather than mere dust. At the beginning of our 57 page opinion in *Pettway III* we stated perhaps naively, that

> Although the path of this law suit is strewn with the corpses of intermediate decisions, the posture of the present case on appeal will hopefully allow final resolution. In

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[4] This class action was originally brought by four named individual plaintiffs—Rush Pettway, Davis Jordan, Alex Fitts, and Peter Wrenn. Three of these class representatives atttended the June 13 meeting and later signed the notice of appeal. The fourth, Peter Wrenn, is no longer employed by the defendant and has not been active in the case for several years. The terms "class representatives" and "named plaintiffs" will be used throughout the opinion to refer to Pettway, Jordan, and Fitts, the three active named plaintiffs.

order to accomplish this the opinion must unfortunately be long and complex.

494 F.2d at 216 (footnote omitted). As is now evident, the fallout continues to radiate, and our earlier optimism regarding the disposition of this case has mutated to less hopeful emotions. Nonetheless, we are undaunted by the crushing weight of accumulated record and remain mindful that the Court must not diverge from the direction charged for us by the Title VII compass, no matter how long and difficult the journey. We, thus, address ourselves to the fourth appearance of this case, determined to ensure that the victims of illegal racial discrimination receive the full measure of relief which the law accords them.

Our burden is eased considerably by the thorough and scholarly opinion written by Judge Tuttle in the prior appeal. Except where subsequent cases further elucidate our prior holding or provide necessary qualifications, we have been able to adopt the factual and legal conclusions reached in *Pettway III* without the need for an extensive review of previously considered authorities. Even so, our task will require an opinion of a magnitude similar to Judge Tuttle's opus.

This case presents a multitude of issues. On the one hand, we are asked to address fundamental questions at the heart of class action jurisprudence, such as the appealability of class action judgments by dissatisfied class members, the standards for settlement approval in the face of widespread dissent from the class, and the choice of the appropriate decision-maker to act on behalf of the class. We are also asked to resolve highly technical questions concerning specific affirmative modifications of present plant operating practices. Appellants' primary contentions on appeal are that the injunctive relieve portions of the judgment below are inadequate to effectuate our mandate in *Pettway III*, that the district court erred in denying back pay to over 1400 class members, and that the back pay settlement

on behalf of the subclass was inadequate and improperly approved by the court. Before reaching these issues, however, we must consider defendant's contention that appellants lack "standing" to appeal the district court's decree. Because our analysis of both appealability and the substantive issues depends in part on whether the decree should be considered a settlement or the court's own judgment, a question upon which there is vehement disagreement, we turn first to an examination of the proceedings below which culminated in the district court's November 20, 1975 final order.

I. *Settlement or the Court's Own Judgment—Entering the Twilight Zone*

[1, 2] The role of an appellate court in reviewing a decree in a class action suit varies greatly depending on whether the decree was reached through a settlement by the litigants or whether the decree represents the judgment of the court. *Compare Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977) (settlement); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976) (settlement); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-51 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976) (settlement); *and Newman v. Stein*, 464 F.2d 689, 692-93 (2d Cir. 1972) (Friendly, J.) (settlement); *with Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (judgment); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (judgment); *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) (judgment); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975) (judgment) *and Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 875-77 (6th Cir. 1973) (judgment). These differing modes of review reflect a recognition of the different character of the two types of judi-

cial resolution. The standard of review appropriate to a court judgment is premised on the requirement that the trial judge, following adversary presentation of the facts and law, exercise his *independent* judgment on each of the issues presented for decision. His ruling must be based on findings of fact supported by evidence in the record and on conclusions of law. The role of the trial court in arriving at an independent judgment closely parallels its more traditional role in the non-class action context. Consequently, review of class action judgments is patterned after the conventional modes of review. The appellate court can review the trial court's findings of fact to ensure that they are supported by the record and are not clearly erroneous, while giving appropriate deference to the trial judge's superior ability to assess demeanor and credibility. The reviewing court is also particularly well suited to make an independent assessment of the law as applied to the facts, again giving deference to the lower court where the law affords some measure of latitude and discretion.

[3] Different problems are posed by class action settlements. Lacking a fully developed evidentiary record both the trial court and the appellate court would be incapable of making the independent assessment of the facts and law required in the adjudicatory context. Moreover, a definitive judicial determination of the facts and law would be appropriate because compromise of legal rights is intrinsic to the settlement process. Because of the limited control exercised by any particular class member over the decision to engage in these compromises, however, the settlement process is more susceptible than adversarial adjudications to certain types of abuse. The interests of lawyer and class may diverge, as may the interest of different members of the class, and certain interests may be wrongfully compromised, betrayed, or "sold out" without drawing the attention of the court. For this reason, in addition to requiring that the trial court evaluate whether a class action settlement is "fair, adequate and reasonable and is not the product of

collusion between the parties", *Cotton v. Hinton, supra,* 559 F.2d at 1330, the law accords special protections, primarily procedural in nature, to individual class members whose interests may be compromised in the settlement process. These protections include notice, ensuring that class members know when their rights are being compromised, and an opportunity to voice objections to the settlement.

[4] We recognize that this neat dichotomy is in some respects over-simple. In the class action context, some of the abuses generally associated with settlements may insinuate themselves into litigation resulting in the court's own judgment. For example, in framing litigation strategy in a complex suit the class attorney and named plaintiffs might concentrate on relief for certain members of the class while ignoring the interests of others. Nevertheless, because the potential for abuse is much greater when class actions are resolved through a settlement, the procedural protections applicable to settlements are not utilized in the judgment context.[5]

Courts have not often been required to examine the nuances of the distinction between a settlement and a court's own judgment. The nature of the lower court's decree is usually obvious as a factual matter and not subject to dispute by the parties. That is decidedly not the case here. The litigants before us dispute almost every factual or quasi-legal element in the case, and the classification of the district court's order as a settlement or judgment is no exception. We are thus faced with the novel issue of determining whether the lower court's order, as it relates to injunctive relief, the scope of the back pay subclass, and the size of the back pay award, constitutes a consent decree or the judgment of the district court.

Appellants maintain that both the injunctive relief and back pay awards resulted from a settlement between ACIPCO and

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[5] This is not to say, however, that courts should not be conscious of the possibility of similar abuses in the judgment context. See discussion in the introduction of section III, *infra*.

Mr. Adams, the original class attorney. If this characterization is accepted, appellants could then argue that the procedures prerequisite to acceptance of the settlement by the district court were not followed below and that the district court therefore abused its discretion in approving the consent decree.[6] The district court's order could then be reversed on this "procedural" ground without necessitating a review of the substantive elements of the order.

The defendant, on the other hand, argues that the entire order of the district court constitutes the court's own judgment, in which event appellants were
not entitled to the procedural safeguards prerequisite to judicial acceptance of a class action settlement. The court's order then could be reversed only if the district court applied an improper legal standard or misapplied the correct standards.

Our careful examination of the record reveals that the district court's order is not susceptible to easy or uniform characterization. Settlements and court judgments are distinguished not by different platonic essences, but by the processes of their creation. Thus in order to resolve the dilemma posed by the litigants, it is necessary to consider the process by which the district court reached its final order of November 20, 1975.

A. *Brief History*

Following remand from this court's decision in *Pettway III*, the district judge met with counsel in chambers on July 11, 1974 and directed the parties to fashion an appropriate decree. On August 19, 1974 the defendant submitted to both Mr. Adams and the court a proposed decree covering both back pay and injunctive relief. The plaintiffs filed objection to the

[6] The procedural requirements for approving a settlement and the scope of the district court's discretion in this area are major issues in this litigation and are discussed at length in section V *infra*.

proposed injunctive order and submitted a counter-proposal for back pay. After negotiations between the parties, the defendant filed a revised proposal, including an augmented back pay offer of $560,000 to the back pay subclass. The plaintiffs did not accept either the proffered injunctive relief or back pay settlement offer. Further negotiations failed to resolve this impasse, and on May 14, 1975 the court entered its May decree. This decree substantially adopted defendant's revised proposal as to injunctive relief but, in an apparent attempt to satisfy the plaintiffs' objections to the back pay award, ordered the company to utilize a modified method of calculation to compute the award for the back pay subclass.[7] This method of calculation resulted in a total back pay award of $907,222.18, to be divided among members of the subclass according to a distribution formula.

On May 23, 1975 the plaintiffs filed a motion for reconsideration, objecting to the injunctive relief provisions of the decree, the exclusion from the back pay subclass of 1400 class members, and the amount of the back pay award. After an in-chambers conference with the parties, the district court overruled plaintiffs' objections to the affirmative relief provisions of the decree and to the court's exclusion of 1400 employees from the back pay subclass, but revised both the back pay distribution formula and the method for determining the size of the back pay award. A few minor changes were also made in some of the departmental lines of progression previously adopted by the court.[8] All of these changes were embodied in

[7] The district court's decree adopted the company's position limiting the back pay subclass to black employees hired prior to July 2, 1965 (the effective date of the Act) who were presently employed by the company or who left the company subsequent to July 2, 1965 with at least one year of company service. This order excluded 1400 class members from consideration for a back pay award and established a back pay subclass consisting of 841 individuals, including a number of persons no longer employed by the company.

[8] These modifications in the lines of progression were made at the request of ACIPCO, which argued that they were necessary "in order

a judgment dated June 12, 1975. Calculations based on the June 12 judgment resulted in a total back pay award of $1,000,000. The court also awarded plaintiffs' counsel $220,000 in attorney's fees.

The court's final order and modified judgment of November 20, 1975, essentially restated the provisions of the June 12 judgment with the addition of findings of fact and conclusions of law. The November 20 final order also provided dissenting subclass members with the opportunity to opt-out of the back pay award. *See* footnote 2 *supra*.

B. *Injunctive Relief*

Our review of the record and this procedural history compels the conclusion that the injunctive relief provisions of the decree constituted the court's own judgment. The district judge indicated his own view concerning the proper characterization of this portion of the decree during a hearing held on October 30, 1975.[9] In the course of that hearing, Judge Lynne stated:

> [T]he judgment of this Court entered on May the 14th granting the affirmative relief mandated by the Fifth Circuit *was my judgment*. I was aided in its formulation by

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to reflect certain changes in job titles and in operations and to afford additional promotional opportunities consistent with the efficiency and safety of the operations." (A 1042). The record does not indicate that attorney Adams ever agreed to these changes. In fact, they were accepted by the court on June 12, 1975, the same day that the plaintiffs' May 23 motion for reconsideration was overruled. The modifications were not made in response to objections by the class, and, in any event, relevant to only a small portion of the injunctive provisions.

[9] On September 5, 1975 the court held a hearing in chambers on appellants' motion to substitute counsel. The court denied this motion, but allowed attorney Wiggins "to represent the disaffected employees as amicus curiae." (A 430) The court also stated its intention to conduct "an evidentiary hearing which will disclose the manner in which the final decree of this court was arrived at." (A 430) The October 30 hearing was held for this purpose.

> the arguments, extensive arguments of counsel, but that is my final judgment implementing the decree of the Fifth Circuit. (emphasis supplied).

The record fully supports this characterization by Judge Lynne. Mr. Adams repeatedly objected to the injunctive relief provisions of the order and at no time consented to defendant's proposed decree of injunctive relief. Nor did the district court modify any of the injunctive provisions in response to plaintiffs' objections. *See* footnote 8 *supra*. Appellants and the EEOC argue that Mr. Adams concentrated on back pay in his negotiations with the company and that as a practical matter the injunctive provisions were based on compromise and settlement. We find nothing in the record that supports this conclusion. Moreover, it can hardly be inferred from the fact that Mr. Adams concentrated on back pay during the negotiations that he consented to the injunctive relief provisions.

Our conclusion is not changed by anything found in a stipulation entered into by Mr. Adams and counsel for the defendant.[10] The stipulation relates an off-the-record statement made by Mr. Adams to the court to the effect that while the May decree and the June final judgment did not contain every provision sought by the plaintiffs, they "constituted a good decree . . . and the judgment should be given an opportunity to work. . . ." Mr. Adams therefore concluded that he would not appeal from the decree. The EEOC argues that this stipulation reveals that the injunctive relief provisions resulted from compromise between the parties. We cannot agree. We perceive a significant distinction between an after-the-fact conclusion that a court's judgment is essentially satisfactory and

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[10] Between the September 5 hearing in chambers and the October 30 evidentiary hearing, Judge Lynne instructed Mr. Adams and counsel for the company to prepare a stipulation setting forth the events leading up to the May decree and the June judgment. The court admitted the stipulation into the record during the October 30 hearing, stating that it "accurately summarized" the events culminating in the final order by the district court.

all things considered, does not justify an appeal, and a before-the-fact consent to the precise terms of defendant's proposed decree. Nothing in the stipulation indicates that Mr. Adams did more than acquiesce in the court's final order after it became apparent that the court would not consider further objections. In the context of this litigation, this may more aptly be characterized as resignation to the inevitable than consent to a settlement. While the arguments of appellants and the EEOC may indicate the potential dangers of less than avid advocacy even in the context of a court judgment, they do not shake our firm conclusion that the injunctive relief portions of the decree represent the court's own judgment, rather than a settlement between the parties, and must be treated accordingly.

C. *Defining the Back Pay Subclass*

The district court's May 14 decree excluded all blacks hired by ACIPCO subsequent to July 2, 1965 from the back pay subclass. As a result, 1400 of the 2241 employees in the class were precluded from receiving any award of back pay. *See* note 3 *supra*. Despite repeated objections by Mr. Adams to the exclusion of class members from the back pay subclass, the court refused to reconsider the decision. We find no suggestion in the record that Mr. Adams ever agreed to the exclusion of 1400 class members from a share of the back pay award. In the November 20 final order, the court acknowledged that the definition of the subclass was the court's own judgment:

> [T]he Court finds from the evidence and concludes that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any other alleged discriminatory practice. (A 415)

We therefore conclude that the exclusion of 1400 class members from the back pay subclass was the court's own judgment and not part of any settlement by the litigants.

D. *The Amount of the Back Pay Award*

[5, 6] The district court's final order of November 20, 1975 provided for the distribution of $1,000,000 to the members of the back pay subclass. If the injunctive relief and subclass determinations resisted facile classification, the manner in which the back pay determination was made defies virtually any traditional characterization. Typically, class action settlements are reached by the parties who draft a consent decree which is submitted to the trial judge for approval. The court's role is generally limited to mediating disputes and offering suggestions. Indeed, we have recently stated that while the court in reviewing a settlement may make suggestions for modifications of the proposed decree, it may not unilaterally change the decree. Approval of the parties' settlement must be either given or withheld. *See Cotton v. Hinton, supra,* 559 F.2d at 1331. *See also Flinn v. FMC Corp., supra,* 528 F.2d at 1173-74.

The events leading to the final back pay award in this case do not conform to this model. An examination limited to the court's May decree and June judgment might suggest that the award was the court's own judgment. While changes in the back pay formula resulting in increases in the total amount of the award were made in response to plaintiffs' objections to both the defendants' back pay offer and the courts' May decree, it was the trial judge, rather than the defendant, who determined the amount of the June award. As the court stated in its June judgment when describing its role in resolving the back pay issue:

> The Court has carefully examined the varying contentions of the parties, has adopted some elements of each, and has determined therefrom that . . ..

> [the court then described the final back pay judgment] (A 183)

Thus it is clear tht the court did not merely accept or reject a proposed settlement.

Nonetheless, the record reveals that the size of the back pay award was determined in a process of negotiation and that the final award was determined with the consent of plaintiffs' counsel. The impression that the back pay award was the court's own judgment results in part because there exists no record of the numerous conferences held between the parties and Judge Lynne on the back pay issue. Judge Lynne's own pronouncements on the question reveal that the final $1,000,-000 back pay figure in the November order was arrived at through some sort of agreement by the parties. For example, at the September 5 hearing on substitution of counsel Judge Lynne stated:

> A study was made by the company which indicated to my satisfaction that there were at least three hundred employees who were not entitled to anything.[11] We went over that study very carefully. The obligation of the company for back pay as disclosed by a very careful analysis was in the neighborhood of $650,000 or $680,000, somewhere along that line . . . .. *After many conferences* in which I expressed the opinion that a formula should be devised so that every black employee in the class would get some back-pay award, *eventually we came to the amount involved of a million dollars.* (A 989) (emphasis supplied).

At the October 30 hearing, which was held for the purpose of receiving evidence on the process by which the May and June judgments were formulated, the court reiterated this view.

[11] In fact, the district court's order provided that 1400 class members were not entitled to back pay.

After stating that injunctive relief constituted the court's own judgment, Judge Lynne noted:

> The matter stands somewhat differently with respect to the back pay award. Back pay award resulted from continuous negotiations. (A 1043)
>
> . . . . . .
>
> I am aware of the fact, of course, that there are members of the class who are dissatisfied with every aspect of this final judgment. That's almost inescapable where human beings are involved, and particularly with the award of *back pay at which the Court arrived with the agreement of counsel.* (A 1044). (emphasis supplied).[12]

Finally, the district judge in his November 20 final order concluded that "the individual back pay awards were arrived at through negotiations between the parties at the urging of the Court and are *in the nature of a consent settlement* . . . ." (A 417) (emphasis supplied).

We are thus faced with a situation in which the events leading to the back pay award do not coincide with the paradigmatic class action settlement, yet plaintiffs' counsel did in fact agree to the amount of the final award. In this context it is virtually impossible to distinguish meaningfully between

[12] Judge Lynne further stated on October 31 that:

> Taking into consideration all of the factors involved, I felt like that every black employee of ACIPCO should receive something, and that is how the negotiations proceeded *to final solution by negotiation.*
>
> If I didn't think that the back pay award was all that could be gotten through negotiations, and I must say that I spent many, many hours in an effort to promote the negotiations . . . and we inched up from $300,000 to the ultimate figure beyond which ACIPCO was not willing to go on the basis of its calculations, and that's the way things came out.
>
> These things, negotiations of that nature to arrive at a lump sum figure cannot obviously be conducted in a courtroom. (A 1188). (emphasis supplied).

a process in which each party finally acceded to a figure chosen by the trial judge[13] and one in which the parties themselves came to an agreement which was then adopted by the court in its final order. Any such distinction is especially tenuous where, as here, the trial judge has been authorized to participate in the settlement negotiations. ***See Pettway III supra,*** 494 F.2d at 258.

In these circumstances, the trial court's characterization of its back pay decree as "in the nature of" a consent settlement marks the extent of the progress we can achieve in our definitional inquiry with any sense of confidence. Recognizing the hybrid nature of the decree, we find it necessary to abandon any further attempt to pigeonhole or classify it, and look instead to the functional considerations underlying the distinctive treatment of settlements and judgments. Under this functional approach, the question becomes whether this decree is more appropriately treated, for purposes of judicial review, as a settlement, requiring certain procedural protections for members of the class, or as the court's own judgment, in which case our evaluation must focus not on the procedural protections, but on the factual and legal bases for the award. We look for guidance to those factors counselling in favor of procedural protections for class members in traditional settlements and counselling against a paradigmatic judgment.[14]

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[13] The stipulation by Mr. Adams and defendant states that before the June judgment was entered "counsel for both parties indicated to the Court that while the proposed back pay award did not conform to their respective initial proposals, the award as directed by the Court was deemed fair and reasonable under all the circumstances and that therefore neither counsel would take an appeal therefrom." (A 417)

[14] We note that at least one of our sister circuits has gone behind the traditional labels to examine the realities of a settlement judgment dispute. As the Seventh Circuit recognized in *EEOC v. United Air Lines,* 560 F.2d 224 (7th Cir. 1977), situations may arise in which a decree is properly treated as an adjudicated judgment with respect

Examining the decree in the context of this appeal by members of the back pay subclass, it becomes clear that we must treat Judge Lynne's order as a consent decree. First, we note that each of Judge Lynne's orders represented an attempt by Mr. Adams to satisfy specific objections advanced by Mr. Adams with respect to prior formulations for determining the size of the back pay award. The trial judge, in essence, was *negotiating with the class.* These negotiations culminated, prior to the June 12 judgment, in Mr. Adams' consent to the $1,000,000 proposal. At least from the viewpoint of the class, the decree was in fact reached by agreement. Such an agreement, which perhaps embodied compromises of class rights, calls for the procedural protections normally associated with class action settlements. To allow a class attorney to compromise the rights of class members without providing these protections would be inconsistent with the policies of Rule 23(e).

Equally important, the statements of the trial judge quoted above reveal that Judge Lynne viewed the order as a consent decree reached through a process of negotiation. The record does not indicate that the final back pay award resulted from the district court's own valuation of the economic loss to the back pay subclass resulting from the defendants' discriminatory practices as measured by the standards set out in *Pettway III.* To the contrary, Judge Lynne's own pronouncements demonstrate that the award was viewed by the court as a com-

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to one party and as a consent decree with respect to another party. In that case, after a proposed consent agreement was submitted to the trial judge one of the union defendants objected to a seniority provision in the decree. The district court nonetheless entered the decree, but crossed out the word "consent" on the first page. The Seventh Circuit commented:

> Judge Will's decision with respect to the Union was an adjudicated decision on the merits and not a mere consent decree. However, the decision remains a consent decree vis-a-vis United.

560 F.2d at 229 n. 7.

promise between the parties.[15] Thus the substantive protections normally present in an adjudicated judgment, including the judge's independent determination of facts and law, were not present here. The district court in framing an adjudicated judgment must determine the full measure of damages to which the class is entitled as a matter of law. Under these circumstances in which the district court did not purport to make such a determination, we cannot treat the award as the court's judgment, and must instead treat it as a consent decree vis-a-vis the class.

[7] In sum, we have determined that the injunctive relief portions of the decree and the denial of back pay to class members employed subsequent to July 2, 1965 must be considered as the court's own judgment. The back pay award to the subclass shall be treated as a consent settlement.

II. *Appealability*

The company argues vigorously that appellants are procedurally disqualified from raising each of their points of error on this appeal. First, ACIPCO alleges that Mr. Wiggins has never been certified as class counsel and thus may not appeal on behalf of the class the injunctive portions of the decree or

[15] The court's findings of fact and conclusions of law incorporated in the November 20 final order further illustrate the court's treatment of the back pay award as a settlement. Conspicuously absent from the court's findings are any factual or legal conclusions necessary to support an independent back pay judgment. Instead, the court couched its findings in language more appropriate to evaluating a settlement. For example, the court concluded that awardees "*may have suffered some* economic loss due to alleged discriminatory practices of the company." (emphasis supplied). The total back pay award was deemed "a *reasonable* approximation" of the aggregate economic loss "which *may have been* suffered" by the subclass, and the individual back pay awards were deemed "to be fair, equitable and adequate." (emphasis supplied) (A 416). This language closely parallels the legal requirement that in approving a settlement, the trial court must evaluate whether the compromise is "fair, adequate and reasonable." *See Cotton v. Hinton, supra,* 559 F.2d at 1330; *Young v. Katz,* 447 F.2d 431, 432-33 (5th Cir. 1971).

the decision to exclude 1400 class members from the subclass. The company also alleges that each of the individual appellants either lacks standing to challenge the back pay settlement on appeal or has yet to receive an appealable final judgment as to back pay. Before addressing these contentions, however, it is necessary to outline briefly the chronology of events leading to this appeal.

A. *Background*

On June 13, 1975, the day after the court entered its June judgment, the three active named class representatives and at least twenty-eight of the thirty elected representatives of the Committee for Equal Job Opportunity[16] met with the class counsel, Mr. Adams, and requested that he appeal the court's judgment. Mr. Adams stated his intention not to appeal the judgment,[17] but indicated that the individual plaintiffs were free to consult other counsel for purposes of retaining separate representation and prosecuting an appeal. On June 20, 1975, 661 class members filed objections to the decree, and on June

[16] The Committee for Equal Job Opportunity is an organization of black employees at ACIPCO which was formed to represent minority employees in litigation against the company. We noted in *Pettway III* that this "intense organization of black employees" was formed by the majority of the affected class in 1965. *Pettway III, supra,* 494 F.2d at 233 and n.53. The Committee is the designated representative of the majority of the class for purposes of this litigation.

[17] Later, in a letter to all class members dated July 22, 1975, Mr. Adams explained:

> Our position has been, and remains, that we have obtained for you the best Decree possible under all the circumstances involved in your case—one that can be used to end discrimination and can be adjusted to deal with the problems as they arise. We will *not* appeal, because an appeal may delay rights already obtained and could cause a loss of some of the back pay you have obtained . . . To win the appeal would only send it back to the District Court, where we are now.

22 these plaintiffs retained Mr. Wiggins as counsel. On September 5 the district court denied appellants' motion to substitute Mr. Wiggins as class counsel; motions requesting discovery and further evidentiary hearings were denied in the court's November 20 final order. This appeal followed.

B. *Injunctive Relief and Exclusion from the Back Pay Subclass*

We consider first the appealability of the district court's judgment as to both injunctive relief and the denial of back pay to 1400 class members. The defendant argues that appellants may not upset the court's judgment binding the class because they are appealing solely in their individual capacities and not as a class.[18] Appellants respond that Mr. Adams ceased to adequately represent the class when he refused to appeal those portions of the order which we have concluded were the court's own judgment. They urge this court to find that the district court abused its discretion in denying appellants' motion to substitute class counsel for purposes of this appeal, that appellants' counsel, Mr. Wiggins, serves as attorney for the class on this appeal, and that this appeal on behalf of the class is therefore properly before the court.

We are not aware of any cases in which the named class representatives and a large portion of the class desired to prosecute an appeal of a district court's judgment, yet the class attorney refused to do so. The issue below us is thus one of first impressions, raising difficult and perplexing questions regarding the appropriate decision-maker on behalf of the class. While the "class" itself clearly has standing to appeal a judgment of

[18] In view of our conclusion that appellants properly bring this appeal on behalf of the class, we need not consider what appellate rights would accrue to a member of the class appealing the court's judgment in his individual capacity.

the district court, *see, e. g., Pettway III, supra; James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), it is far from clear who may make the final determination of whether the "class" should appeal when the desirability of an appeal is at issue. In the instant case the class attorney, Mr. Adams concluded that an appeal would not be in the best interests of the class. Mr. Adams stated on the record that he believed the decree to be a fair one and that an appeal would only delay implementation of the rights already obtained by the plaintiffs. On the other hand, the three active class representatives, the Committee for Equal Job Opportunity, and a sizeable portion of the class itself believed that the decree did not adequately vindicate the interests of the class and that an appeal was warranted.

[8] In the context of individual-plaintiff litigation the roles of the attorney and the client are well defined. The A.B.A. Code of Professional Responsibility envisions the attorney as an advocate of the interests of the client. American Bar Ass'n, Code of Professional Responsibility, EC 7-1 [hereinafter cited as ABA Code]. Although the lawyer has some freedom to make tactical choices during litigation without consulting his client, the lawyer is expected to defer to the client's wishes on major litigation decisions. *See* ABA Code EC 7-1, EC 7-7, EC 7-9. Unfortunately, it remains unclear whether this model can be carried over to the class action context, as no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. *See generally* Developments in the Law—Class Actions, 89 Harv.L. Rev. 1318, 1578 (1976). Certainly it is inappropriate to import the traditional understanding of the attorney-client relationship into the class action context by simply substituting the named plaintiffs as the client. The interests of the named plaintiffs and those of other class members may diverge, and a core requirement for preventing abuse of the class action device is some means of ensuring that the interests and rights

of each class member receive consideration by the court. Were the class attorney to treat the named plaintiff as the exclusive client, the interests of other class members might go unnoticed and unrepresented. *See Gonzales v. Cassidy*, 474 F.2d 67, 69-71, 76 (5th Cir. 1973); Developments in the Law, Class Actions, 89 Harv.L.Rev. 1318, 1592-95 (1976). Thus, when a potential conflict arises between the named planitiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. In such a situation, the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members.

This does not mean, however, that the class attorney may ignore the wishes of the class representatives in making fundamental litigation decisions. As one court has stated, "An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved." *Leib v. 20th Century Corp.*, 61 F.R.D. 592 (M.D.Pa. 1974). In the context of a shareholders' derivative action, *Saylor v. Lindsley*, 456 F.2d 896 (2nd Cir. 1972), Judge Friendly has stressed that courts should not "accept the view that the attorney for the plaintiff is the *dominus litis* and the plaintiff only a key to the courthouse door dispensable once entry has been effected":

> There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which . . . may cause divergence of interest in cases where extremely large amounts are at stake, there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and appeal. We say this not in criticism but in simple recognition of the facts of class action life.

456 F.2d at 900-01. The same considerations may cause a class attorney who has been awarded a substantial fee by the court to conclude that an appeal of the court's judgment might result in personally unremunerative litigation or a substantial and undesirable delay in the receipt of the fee award. When the possibility that counsel's own fervor may have been exhausted by an apparently endless legal battle is added to the equation, the potential conflict between the interests of the class and those of its attorney in an appeal cannot be ignored.

[9] It is, therefore, clear that the decision to appeal cannot rest entirely with either the named plaintiffs or with class counsel. Nonetheless, the Rule 23(a)(4) requirement that the trial court determine whether "the representative parties will fairly and adequately protect the interests of the class" contemplates that the named plaintiffs will undertake a major role in the prosecution of a class action. The requirement also provides an important guarantee of a coincidence of interest between the named plaintiffs and the class.

We considered the scope of Rule 23(a)(4) and the proper role of the class representatives in deciding whether to appeal from a class action judgment in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). Gonzales was a class member in a prior class action in which only the class representative, Gayton, was awarded both retrospective monetary relief and prospective injunctive relief. The other members of the class, including Gonzales, were granted only prospective relief. No appeal was

taken. Gonzales subsequently brought a second class action raising identical issues against the same defendant, who sought to raise res judicata as a bar to relief. We rejected the defendant's res judicata defense, finding that Gaytan's failure to appeal the earlier judgment constituted inadequate representation of the class. We stressed throughout the *Gonzales* opinion that it was the class representative's duty to appeal the lower court's judgment and thus it was the *class representative* who inadequately represented the class. Implicit in our discussion and holding in *Gonzales* was the conviction that, at least under the circumstances of that case, the class plaintiff and not the class attorney, was responsible for deciding whether to appeal.

[10, 11] The foregoing considerations convince us that, at least as an initial matter, the decision to appeal a class action judgment must rest with the class plaintiffs. If in making that decision the class plaintiffs arguably fail to adequately represent the interests of the class, the class attorney should point out potential inadequacies or conflicts of interest to the trial judge. Where the named plaintiffs wish to appeal, but the class attorney concludes that an appeal is not in the best interest of the class, the district court must exercise its discretion in deciding whether to substitute class counsel to allow the named plaintiffs to maintain the appeal on behalf of the class.[19] The proper exercise of the district court's discretion will depend on the facts and circumstances of each case. Among the factors that should be considered by the court are (1) the adequacy

[19] Distinctive problems may be presented where the named plaintiffs refuse to undertake an appeal which the class attorney believes to be in the best interests of the class or where both the named plaintiffs and the class attorney decide not to appeal. If no appeal is taken and the failure to pursue an appeal constitutes inadequae representation, other members of the class may certainly pursue relief in a collateral proceeding. *Gonzales v. Cassidy, supra.* Whether, and how, a direct appeal may be taken absent the participation of the original named plaintiffs, or the participation of both the named plaintiffs and the class attorney, are issues we need not resolve for purposes of this appeal.

of representation of the named plaintiffs, including any apparent or potential conflicts of interest they might have with the remainder of the class, (2) the extent to which other class members support or oppose the appeal, and the extent to which an appeal may be necessary to protect the interests of absent class members, (3) the adequacy of representation provided by the class attorney and any conflicts of interest between the class attorney and the class, and (4) the reasonableness of the decision to appeal, including an assessment of the possibility of success on the merits.

[12] Applying these principles to the instant case, we conclude that the class representatives should have been allowed to prosecute this appeal on behalf of the class. The trial court abused its discretion in denying appellants' motion to substitute class counsel for purposes of appealing the court's judgment.

First, we note that the class representatives have provided excellent representation on behalf of the class during the ten years of this litigation. The named plaintiffs, through the representative Committee for Equal Job Opportunity, have held monthly meetings and distributed news letters to keep the class informed of the progress of the case. There is undisputed testimony in the record that at an early stage of the settlement negotiations, the named plaintiffs rejected offers of special back pay compensation to the most active class members, themselves included, and demanded equal considerations for all members of the class. (A 1163-65). Throughout the entire course of this litigation, including the post-judgment period, not a single class member has objected to the representation provided by the named plaintiffs. Nor has any class member objected to the prosecution of this appeal. The only potential conflict between the interests of the class representatives and those of other class members arose when all three class representatives were awarded relatively sizeable shares of the back award, while many class members received no back pay. This poten-

tial conflict disappeared, however, when all three active named plaintiffs rejected their back pay award and chose to prosecute this appeal.

We also find noteworthy the extent to which individual class members have demonstrated their interest in, and support for, this appeal. We reiterate that the sentiment of the class is but one factor in our analysis of the appealability question. Insofar as relevant, this is a factual question for which we necessarily must draw inferences from the sparse information contained in the record. Nonetheless, we find that the record clearly indicates a deep-seated and widespread dissatisfaction with the injunctive provisions of the decree. Among the 841 members of the subclass awarded back pay, 511 signed the June 20, 1975 objections to the decree and notice of intent to appeal. These objections focused on the injunctive portions of the decree in great detail. An additional 78 members of the subclass refused to accept the back pay award.[20] Thus 589 members of the 841 person subclass indicated dissatisfaction with the court's judgment. *See* footnote 3 *supra*.[21] While only 150 of the 1400 class members who were excluded from the back pay subclass explicitly objected to the injunctive portions of the decree by signing the June 20 objections, the record indicates that many

[20] The district court presumably was aware of the fact that a substantial portion of the subclass had not cashed their back pay check at the time of the October 30 hearing, because its November 20 final order extended the deadline for opting into the subclass until December 15, 1975.

[21] We recognize that some of the subclass members who refused to cash their back pay check may have objected only to the back pay award and not to the injunctive portions of the decree. However, all 511 awardees who signed the June 20 notice indicating an intent to appeal explicitly objected to the injuntion portions of the decree. The record indicates that many awardees who refused to cash their back pay check did so in part because they feared that opting into the settlement would preclude appellate review of the injunctive provisions of the decree as well. Under the circumstances, it is clear that a substantial majority of the subclass favored this appeal of the injunctive portions of the decree.

individuals in this group received no notification of the judgment and had no opportunity to object either to their exclusion from the subclass or to the injunctive provisions of the decree.[22] Moreover, according to appellants' figures which are not contested by ACIPCO, over 1000 of the 2242 class members were no longer employed by ACIPCO in 1975. These members of the class did not have a personal stake in the injunctive provisions of the decree and could not be expected to object to allegedly inadequate injunctive relief. When due consideration is given to these factors, along with the widespread objections to the injunctive portions of the decree raised by the subclass members and the failure of a single class member to object to the representation provided by the named plaintiffs or their decision to prosecute this appeal, we find that a substantial portion of the class supported this appeal on the issue of injunctive relief.

Furthermore, there can be no doubt that an appeal from the denial of back pay is in the best interests of the 1400 class members who were excluded from the subclass. *Gonzales v. Cassidy*, *supra*, compels the conclusion that the class plaintiffs, in order to satisfy their duty to adequately represent the class, must appeal this portion of the court's order. As we noted in *Gonzales*:

> Gaytan [the class representative], through his attorney, vigorously represented the class until he obtained individual relief [for himself only]. The problem is that he was repre-

[22] On May 21, 1975 a copy of the May decree and an explanatory letter were mailed by the company to all class members then employed by ACIPCO. According to figures proffered by appellants, over 1000 class members were no longer employed by ACIPCO in 1975 and thus did not receive this information. This letter constitutes the only notification of the court's decree sent by ACIPCO to those class members who were excluded from the subclass. While no Rule 23(e) "notice" is required for those portions of the decree which constitute the court's own judgment, and thus as a procedural matter we are not concerned with the "notice" received by those excluded from the subclass, the familiarity of this portion of the class with the injunctive portions of the court's May decree and June judgment is highly relevant in assessing the class' support for this appeal.

> senting approximately 150,000 persons, who, although having had their licenses and registration receipts suspended without due process, were denied any relief by the three-judge court's prospective only application of its decision. *So long as an appeal from this decision could not be characterized as patently meritless or frivolous, Gaytan should have prosecuted an appeal.* Otherwise, it cannot be said that he vigorously and tenaciously protected the interests of the class he was purporting to represent, or that all members of the class had been afforded due process of law by having a full day in court. It is axiomatic that an appeal is a significant element in the judicial process. Gaytan's failure to prosecute an appeal deprived the members of his class, whose rights were not vindicated by the three-judge court's decision, of full participation in this process.

474 F.2d at 76 (emphasized supplied). Likewise, the class members excluded from the subclass were denied any back pay relief to compensate for past discrimination by the company. As our discussion in section IV *infra* reveals, an appeal from this decision could hardly be characterized as patently meritless or frivolous.[23] On the basis of *Gonzales* alone the district court should have granted the motion to substitute counsel for the purpose of appealing this portion of the decree.

Finally, we note that an appeal on the issue of injunctive relief can hardly be deemed frivolous. The trial judge was well aware of the complexity of the legal and factual issues involved and the prior history of this litigation.[24]

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[23] Throughout the period between the May and November orders Mr. Adams repeatedly objected to the exclusion of 1400 class members from the back pay subclass. We must assume, therefore, that he believed that there was some merit to the contention that these class members were entitled to back pay.

[24] Nothing that we have said thus far is meant to criticize the representation of Mr. Adams during the ten years in which he vigorously litigated the plaintiffs' claims. We have previously had occasion to remark upon Mr. Adams' experience in representing plaintiffs in class action suits, *Cotton v. Hinton*, 559 F.2d 1326, 1332 and n.3 (5th Cir. 1977), and have no reason to discredit the sincerity of his belief that an appeal was not in the best interests of the class. Whether this belief was sincere or insincere, however, is not at issue here. The real question is whether, under the circumstances of this case, the district court should have let Mr. Adams' decision prevent appellants from appealing on behalf of the class by denying permission to substitute counsel.

In conclusion, we hold that under the circumstances of this case the trial judge abused his discretion by not granting appellants' motion to substitute class counsel for purposes of appealing the court's judgment. The decision to appeal rested as an initial matter with the named plaintiffs. These representatives chose to appeal, and an analysis of the factors considered above demonstrates that their choice should have been honored. The named plaintiffs have provided excellent representation in the past, and there is no indication in the record that their decision to appeal was based on any considerations other than the interests of the class. The decision received widespread support among the class. With regard to those who were denied back pay, there can be no doubt that an appeal is necessary to effectuate their legal rights. While we do not question the sincerity of Mr. Adams' belief that an appeal of the injunctive decree is not in the class' interest, nothing in the record convinces us that the named plaintiffs' conclusion on this question was unreasonable. *See* section III *infra*. Finally, the issues raised on appeal are neither frivolous nor insubstantial. We therefore shall treat this appeal of the injunctive relief and denial of back pay portions of the district court's decree as an appeal on behalf of the class.

C. *Back Pay Award to the Subclass: Appealability of the Settlement.*

[13] In subsection I(D) *supra* we determined that the award of back pay to the subclass must be treated as a settlement. It

is well settled that dissenters to a class action settlement may retain new counsel to appeal the district court's approval of a consent decree. *See Cotton v. Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976). The company poses the rather ingenious argument that notwithstanding this general rule, none of the appellants in this case has "standing" to appeal the back pay settlement. First, the company argues that those members of the back pay subclass who failed to cash their back pay checks may not appeal the district court's approval of the settlement because under the terms of the court's November 20 final order, they have opted out of the subclass and have yet to receive an appealable final judgment as to back pay. The company then argues that those appellants who accepted their back pay award by cashing the company's check did so under the express condition that acceptance of back pay constituted a release of any claims of discrimination,[25] and those appellants therefore have waived their right to maintain this appeal. Finally, the company maintains that those appellants who were excluded from the back pay subclass have no standing to contest on appeal the adequacy of the back pay award received by others. Therefore, according to the company, individual appellants either lack standing to appeal, have waived their right to appeal, or are not the subjects of an appealable final back pay judgment.

[14] We agree with the defendant that appellants who were excluded from the subclass and denied back pay lack standing to contest the adequacy of the awards received by other class members. However, we conclude that the decree does constitute an appealable final judgment for those awardees who opted out of the settlement by refusing to cash their back pay checks. We also find that awardees who cashed their checks pursuant

[25] The portion of the decree pertaining to this release is reproduced in footnote 78 *infra*.

to the district court's opt-in, opt-out scheme did not waive their right to appeal the back pay settlement.

[15] It is clear that the district court's November 20 final order constitutes a final decision within the meaning of 28 U.S.C. § 1291.[26] The order was intended to end the litigation on the merits and leave nothing for the court to do but execute judgment. *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

[16] ACIPCO incorrectly asserts that the district court's order does not constitute a final judgment because the order provided subclass members who opted out of the subclass an opportunity to pursue individual damage claims in this lawsuit. We read the order to require subclass members who opted out of the subclass to pursue their damage claims in separate, independent lawsuits. In *Pettway III* we stated that the district court could allow claimants who were dissatisfied with their pro rata share of a class-wide back pay award to opt-out of the back pay subclass and demonstrate that they were entitled to a larger award. 494 F.2d at 263 and n. 154. The district court properly attempted to utilize this opt-out device. In the notice to all subclass members who had not yet cashed their back pay checks, mailed by the company at the court's direction on November 21, 1975, the court advised that back pay awards would become "null and void" as to all wardees who failed to cash their check prior to December 15, 1975. *See* November 20 Final Order and Modified Judgment, A. 418. The court's notice continued:

> "[Y]ou will have the right thereafter to bring an independent action against the Company . . . and the Company will have the right to assert . . . [defenses] as if

[26] Section 1291 provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

there had never been the entry of the back pay in your favor *in the Pettway case.*" (A 418) (emphasis supplied).

In the November 20 final order the court explained that a claimant who opted out of the settlement would have the right to pursue an independent action "free of the *defense of res judicata or collateral estoppel* insofar as his individual back pay claim is concerned." (A 417) (emphasis supplied). This language, together with the fact that the court did not afford awardees who declined to cash their back pay checks any opportunity to prove their individual damages in the proceedings of *this* suit, convinces us that the district court contemplated that its November final order would be the final adjudication in this suit of the rights of dissatisfied subclass members. Consequently, the court's order represents a final decision within the meaning of 28 U.S.C. § 1291.[27]

[17] We also find that those claimants who cashed their back pay checks may appeal from the lower court's approval of the settlement notwithstanding the fact that the waiver form they signed in cashing their checks could be construed as a

[27] The instant class suit was originally certified as a Rule 23(b)(2) action. As we demonstrate in subsection V(B)(1) *infra*, in Rule 23(b)(2) class actions the district court may not require members of the back pay subclass to either accept their award or opt-out of the class suit altogether. At most, awardees may be permitted to opt-out of a subclass, while remaining in the class to pursue their individual claims in the same suit. *See Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 736 (5th Cir. 1976); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1057 (5th Cir. 1975); *La Chappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 n. 7 (5th Cir. 1975). This is precisely the result we intended in *Pettway III*. *See* subsection V(B)(1) *infra*. Thus the district court's order should have allowed awardees who opted out of the subclass to pursue their damage claims in further proceedings in this suit. This fact, however, does not make the court's order any less a final judgment. Indeed, in *Cotton v. Hinton, supra*, this court reviewed a settlement which included back pay provisions even though individual back pay awards were yet to be determined. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

waiver of their right to appeal.[28] Rule 23 recognizes that many small claimants frequently have no litigable claim unless aggregated in a class suit. Because of the cost and difficulty of proving individual damages, *see Pettway III, supra*, 494 F.2d at 258-63, even the opportunity to prove individual damages in the same litigation often will not be an adequate substitute for participation in an acceptable settlement. Without the right to appeal approval of a settlement prior to the expiration of the option period, dissatisfied claimants could be faced with the equally unpalatable alternatives of opting into a settlement which should not have been approved or undertaking the burdens of individual actions. *See Ace Heating & Plumbing Co.*, 453 F.2d 30, at 32-33 (3rd Cir. 1971). Requiring claimants to opt into a back pay subclass before they have an opportunity to seek appellate review of the settlement would be inconsistent with design of Rule 23(e), which bounds the court's discretion in approving proposed settlements. Subclass members have an interest in ensuring that a settlement is reviewed by the district court in conformity with settled legal standards, and we will not allow subversion of the protections afforded by Rule 23(e) by requiring claimants to opt-out of a settlement in order to obtain appellate review.

[18, 19] To protect the rights of claimants to participate in a valid settlement, we conclude that the option of subclass members to opt into a back pay settlement may not be cut off before a final determination of the propriety of that settlement is made. *See* subsection V(B)(2) *infra; cf. Ace Heating & Plumbing Co. v. Crane Co., supra.* Because the district court improperly terminated the option to opt into the settlement before this appeal could be completed, thereby imposing upon the subclass members the impermissible choice of opting into what may be an unacceptable settlement or opting out of the subclass and undertaking the burdens of proving individual

[28] *See* footnote 78 *infra.*

claims, we conclude that any waiver of appellate rights by those claimants who opted into the subclass is invalid.

Thus each of the appellants who were members of the back pay subclass may appeal from the district court's approval of the back pay settlement. Having already held that the appeal of the injunctive relief and denial of back pay portions of the district court's judgment has been brought on behalf of the class, we conclude that each of the substantive issues raised by appellants is properly before us. With both a sense of relief for having finally resolved the thorny procedural issues in the case and apprehension at what lurks ahead, we now turn to appellants' substantive claims.

III. *Injunctive Relief*

Having concluded in section I, *supra*, that the injunctive relief portions of the district court's decree constituted the court's own judgment, we now reach appellants' contention that Judge Lynne failed to follow our mandate in *Pettway III* in devising affirmative relief for class members. Our discussion is unavoidably complex, and we find it necessary to reverse the district court on a number of points. Underlying many of our determinations with respect to the injunctive portions of the decree are the complex and technical problems inherent in judicial attempts to remedy past employment discrimination by restructuring the multi-faceted employment practices of a large industrial concern. To a large extent, our own difficulties with the decree stem from the method by which Judge Lynne attempted to resolve these problems. We do not criticize Judge Lynne for attempting to utilize informal techniques of conciliation. We know from long experience the limitations and frustrations inherent in grappling with these problems using traditional litigative methods. We are not so bold or naive as to suggest that these complexities would dissolve if remedial responsibilities in the employment discrimination area were entrusted to an alternative institutional decision-making body, and recognize in any case that Congress has placed on the courts a responsibility to give effect to its policies of equal and non-discriminatory treatment for minorities in the employment area, as in other phases of our national life. In carrying out our responsibilities, we must and do remain alert to the possibility of utilizing innovative techniques of conciliation and problem solving. Many of our recent opinions in the Title VII area recognize the desirability of encouraging settlement among the contesting parties, particularly with respect to required modifications of plant employment and promotion practices. *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed. 2d 187 (1976). We further recognize that the courts can sometimes best facilitate these conciliation efforts by utilizing informal techniques. We do not suggest here that conciliation efforts be forced into a Procrustean bed of on-the-record hearings.

[20] Sometimes, however, settlement efforts do not achieve fruition. In these instances the trial court must alter its role and adjudicate the dispute among the parties. Such an adjudication, particularly in the context of class action litigation, presents a series of conundrums for both trial and appellate courts. Much of the information and evidence necessary to frame an adjudicated decree may be known to the district court through its participation in settlement negotiations, but will not be reflected on the record. Thus, the evidentiary support for the district court's ultimate decision will not be apparent to a reviewing court unless steps are taken to develop a satisfactory record. Evidentiary hearings and the submission of exhibits into the record may sometimes appear redundant and inefficient from the perspectives of the parties and the district court, but they are indispensable for purposes of con-

scientious appellate review. This court cannot properly review a district court's findings and conclusions without examining the supporting evidence. *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978).

[21] The fundamental problem facing us in our task today is the absence of an adequately developed factual record. Following our remand in *Pettway III*, the district court encouraged settlement negotiations in informal proceedings held off the record. No trial or evidentiary hearing was held. As a result, almost no evidence was added to the record subsequent to our decision in *Pettway III*. We do not criticize the district court's attempt to resolve this dispute through informal procedures. When it became clear, however, that settlement negotiations would not bear fruit, it was incumbent on the court to base its conclusions on evidence in the record. Instead, numerous conclusions of the district court rest on factual predicates without evidentiary support in the record. ACIPCO represents that the district court considered evidence in chambers which supported these findings and conclusions, but we have no way of judging whether this is correct or whether the "evidence" which may have been examined by the district court actually supports its conclusions. The learned and experienced judge who tried this case may conscientiously, logically, and intelligently have come to the conclusion that his judgment was correct. There may have been rivers of evidence coursing through the chambers of the district court. But without that evidence available to us on the record, we are unable to gauge the depth of those rivers or assess its navigability as a route to the district judge's conclusions. Other conclusions of the district court rest on evidence already assessed in our prior opinion and found insufficient to support some of the legal conclusions now drawn therefrom. In light of our clear mandate in *Pettway III*, this evidence standing alone simply cannot be the basis for legal conclusions already rejected by

The company's failure to present evidence on the record in support of its position may be due in part to the failure of all the parties to distinguish clearly those portions of the decree which were resolved by settlement from those which were adjudicated by the court. It is likely that some portions of the injunctive decree actually were reached through the agreement of both ACIPCO and attorney Adams. Nevertheless, the decree represents the court's own judgment. *See* subsection I(B) *supra*. If it were clear precisely which portions of the injunctive decree were reached through agreement of counsel, we could treat those sections of the decree as a settlement and require the Rule 23 procedural saefguards discussed in subsection V(A), *infra*. As has been the case with regard to most of the factual issues raised by this appeal, however, the record is silent on this question. In any event, the district court did not draw such a distinction among portions of the injunctive decree or provide class members the requisite procedural safeguards with regard to those sections, if any, which it considered the parties to have accepted. Under the circumstances, we must require full evidentiary support for each element in the injunctive decree. Otherwise, the participants to the negotiations could compromise the legal rights of the class members free from both the procedural strictures of Rule 23 and the appellate court's review of the substantive legal requirements for framing injunctive relief.

In summary, we must reverse the district court where it misapprehended the purport of our prior mandate or where its conclusions are not supported by evidence in the record. This appeal presents multiple manifestations of ACIPCO's failure to supplement the record and of the district court's failure to base its conclusions on evidence in the record. That the errors below may flow from a single source does not, however, relieve us of the responsibility to consider and address each legal issue properly raised by appellants.

A. *Two Decades of ACIPCO History*

Our extensive opinion in *Pettway III* discussed at length the organization of the company, 494 F.2d at 217-18, its employment practices through 1974, *id.* at 218-222, and the present discriminatory effect of these practices necessitating affirmative relief. *Id.* at 222-43. While we need not repeat that discussion here, it is necessary at the outset to summarize briefly the factual and legal conclusions relevant to our disposition of the issues raised on this appeal. We shall then examine the standards outlined in *Pettway III* for framing affirmative relief, the district court's injunctive decree on remand, and appellants' allegations that the decree does not comply with our prior mandate.

1. Prologue: Company Organization

The company's operations are organized into various departments. The five primary production departments include the monocast department, the fittings foundry, the steel foundry, the melting department, and the steel pipe foundry. The machine shop performs some additional labor on items produced by the production departments and provides replacement maintenance on all machinery. The company also has seven service departments consisting of the general yards, central stores, shipping, electrical, maintenance, inspection, and construction departments. The responsibilities of these departments include the receipt of raw materials, the shipment of finished products, and the performance of various maintenance functions. The company's highly-skilled craft positions are concentrated in the electrical, maintenance, aand inspection departments and in the machine shop. These four craft departments and the steel pipe foundry have historically contained very low percentages of black employees.[29]

[29] In 1971 36% of the ACIPCO's 2514 employees were black, yet only 9% of the employees in the maintenance department, 11% in the machine shop, 5% in the electrical department, and 3% in the inspection and the steel pipe departments were black.

Prior to our 1974 decision in *Pettway III*, the method of advancement within all of ACIPCO's departments involved a wage progression schedule consisting of 15 pay groups. As of the date of the 1971 trial below, over 95% of the company's black employees worked at pay groups 1-8. Only 30% of ACIPCO's white employees held these lower paying positions. Advancement up the pay group ladder was based on departmental seniority. Until 1971 the company did not have a systematic written procedure for filling vacancies. Promotions within a department went to the senior department employee in the pay group immediately below the vacancy with advancement within pay groups 9-15 subject to illegal testing requirements. The company discouraged transfers between different departments. *Id.* at 223 n. 27. In 1971 the company adopted a new procedure for filling vacancies in positions above pay group 3. First job vacancies were posted for three days within the department. If qualified bids were received, a selection was made on the basis of departmental seniority and ability. If no qualified bids were received from within the department, vacancies were posted plant wide and filled on the basis of plant-wide seniority. An employee transferring from another department did not carry over any of his accumulated seniority for purposes of seniority within the new department. *Id.* at 223.

2. Our Evaluation of ACIPCO's Employment Practices in Pettway III

Until 1961 ACIPCO maintained a formal policy of segregating employees by race. While this policy was discontinued after the promulgation of Presidential Executive Order No. 10925 in 1961, the resulting segregated employment profile was maintained at least through 1964, when the company instituted testing and educational requirements for hiring, interdepartmental transfer, and intradepartmental promotion. These testing and educational requirements, which were held to be illegal in *Pettway III*, remained in effect until as late as 1971.

Pettway III, supra, 494 F.2d at 219-20, 222, 258. As a result, in 1971 only 25% of the 232 jobs in the plant were integrated. 494 F.2d at 230.

Based on these findings we concluded that "black employees have been derogated to the lower paying, non-skill departments and to the lower paying positions in all departments because of these past discriminatory employment practices." *Id.* at 236. We then determined that the departmental seniority system acted to maintain and effectuate the stratification of black employees in the less desirable departments and in the lower paying, non-skilled jobs within all departments. The seniority system locked black employees into their present departments because a black desiring to transfer to a department with better promotional opportunities would have to forfeit seniority and often endure a wage cut in order to transfer. An employee who did transfer would be handicapped by being unable to compete equally for promotion based on departmental seniority with a white employee situated in the department at the time of the transfer. This would be true even if the white employee had less plant seniority than the black transferee. *Id.* at 223-24, 235-36. Furthermore, in many cases the requirement that initial consideration be given to persons within the department perpetuated the historical stratification of black employees by preventing the majority of class members from even applying for jobs in the higher paying, predominantly white departments. After reviewing the relevant case law, we concluded that affirmative relief was required. *Id.* at 236.

3. Pettway III Guidelines for Relief: Promotion and Transfer Procedures

In *Pettway III* we followed the well-established principle that on remand a remedy must be fashioned within the framework of the "rightful place" theory. 494 F.2d at 243. Under this theory, blacks must be "assured the first opportunity to move

into the next vacancies in positions which they would have occupied but for the wrongful discrimination and which they are qualified to fill." *Id., quoting United States v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973). We therefore ordered the district court to issue an injunction requiring "(1) the posting of all vacancies plant-wide; (2) the selection of 'qualified' personnel for the vacancies on the basis of *plant-wide* seniority; (3) transferring members of the class shall retain their plant-wide seniority for all purposes including promotion, lay-off, reduction-in-force, and recall; (4) advance entry into jobs for which an employee in the class is 'qualified' or for which no specific training is necessary; (5) red circling of members of the class . . . ."[30] *Id.* at 248 (footnotes omitted).

We tempered this holding by allowing the company to demonstrate a "business necessity" for maintaining departmental lines of progression in which experience in one position is required for advancement to a higher position in the line. We stressed, however, the "heavy nature of the defendant's burden" to justify a seniority system which perpetuated past discrimination. *Id.* at 245. Quoting from *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), we stated that "the 'business necessity' doctrine must mean more than that transfer and seniority policy serve legitimate management functions. . . . Necessity connotes an *irresistible*

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[30] In *Pettway III* we described the red circling remedy as follows:

> Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs and is recognized as necessary since otherwise employees could not afford to take training jobs paying lower wages. Where the job from which the employee transfers pays more than the new job, where the new job is in a department where the top wage rate is greater than the rate of the old job, the employee is paid the wage rate of the old job, until he advances to a job paying more than that rate or until he voluntarily freezes himself in at the new job.

494 F.2d at 248 n.99. Red circling is discussed in greater detail in subsection III(D) *infra*.

demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant but also be essential to those goals." *Id*. Thus business necessity justifies existing seniority and promotion systems only where the district court finds that each position in the line of progression within a department provides necessary training for the next higher job and that there are no acceptable alternatives for accomplishing the company's safety and efficiency goals. *Id*. at 245-46.

We then remanded the case to the district court to frame an injunctive order which would effectuate our mandate.

4. Relief on Remand

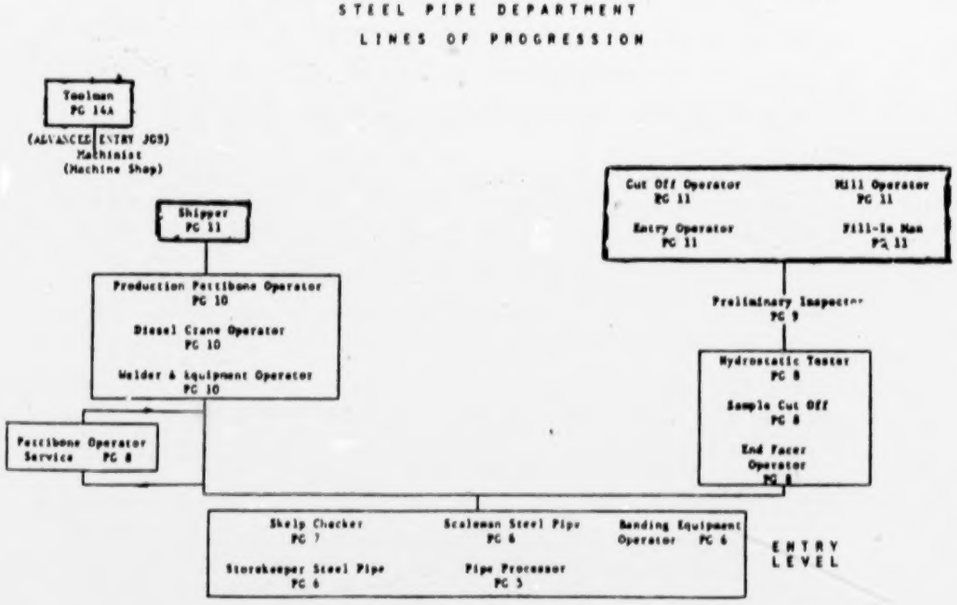
On remand the district court entered an order which effected the following changes in the company's seniority and transfer policies. Plant seniority was substituted for departmental seniority for purposes of future promotions, demotions, layoffs, and recalls, subject to a one year residency requirement for transferees to a new line of progression.[31] The court's order also prescribes a two step procedure for filling vacancies within the newly established lines of progression. Permanent vacancies are to be filled by incumbent employees working in, or laid off from, the position immediately below the vacancy in the line of progression with bidding based on plant seniority as modified by the residence requirement. Each resulting vacancy is to be filled from within the line in the same manner, until an entry level job remains which cannot be filled from within the line of progression. At this point the second step of the bidding procedure is reached, and the entry level position is posted plantwide, with bids considered according to plant seniority. Employees bidding for a position in a new line of progression must have at

[31] During this residency period, the transferee's departmental seniority in the new department is used for promotional purposes. Plant seniority is retained for all other purposes during the employee's first year in the new line of progression. After the expiration of this residency period, the employee's plant seniority is utilized for all purposes, including promotion.

least six months seniority, and the company retains the right to refuse to promote or to transfer any employee it determines is unqualified to fill a position. Furthermore, the company may return any transferring employee to his prior position at the end of a 30 day trial period, without loss of seniority, if he cannot meet the requirements for the new job.

The district court, in its attempt to reconcile the rightful place requirement with the business necessity exception to plant-wide bidding for every position in the plant, also made three general revisions in the company's lines of progression.[32]

[32] The following diagram illustrates the revised line of progression for the steel pipe foundry.



First, the court's order created "pre-entry level" positions, consisting of unskilled jobs in the lower pay groups which do not provide experience necessary for the successful performance of the next higher-rated position. These jobs were removed from the departmental lines of progression, with the result that potential transferees can now skip over these positions and bid immediately into the higher "entry level" positions. Second, the court "boxed" together certain jobs requiring similar skills and providing roughly equivalent experience for preparing employees for the next higher position on the line. The employee with the greatest plant seniority on any job within the box would have the first opportunity to bid on the next higher-rated position. This boxing mechanism affords employees an opportunity to bypass other jobs in the box, thus hastening the rise of plant-senior class members to their rightful place within the lines of progression.[33] Finally, the court designated eight positions as "advanced entry jobs." These are higher-rated positions within certain departments, for which the requisite training can be obtained through successful performance on similar jobs in other departments without any necessity for prior departmental experience.[34] Vacancies in advanced entry jobs are to be filled through plant-wide bidding based on plant seniority.[35]

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[33] The diagram of the steel pipe department lines of progression, reproduced in footnote 32 supra, illustrates this boxing mechanism. In this line of progression the "hydrostatic tester," "sample cut off," and "end facer operator" positions are boxed together. An employee in any of the entry level positions may bid into any of those boxed positions. Likewise, an employee in any of these boxed positions may bid for the "preliminary inspector" position.

[34] For example, in the steel pipe department, illustrated in footnote 32 *supra*, the "toolman position" is designated as an advanced entry job. A machinist in the machine shop may bid for a vacancy in the toolman position without having prior experience in the steel pipe department.

[35] In response to our mandate in *Pettway III* the court's order also provided for red circling, modified the company's reduction in work force and recall procedures, revised the qualifications for the apprenticeship program, supervisory positions, and on the job training, and established a grievance procedure and an implementation committee. Appellants' objections to these portions of the order are discussed in subsections III(D)-(G) *infra*.

5. *The Present Appeal*

Appellants maintain on appeal that the promotion and transfer procedure outlined above is deficient in numerous respects and does not comport with our mandate in *Pettway III*. Before evaluating appellants' contentions, however, we must first examine the case law subsequent to *Pettway III*, and particularly the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), to determine whether the standards enunciated in our prior decision are still applicable for purposes of this appeal.

B. *The Effect of Teamsters on Our Prior Mandate*

In *Pettway III* we concluded that the "neutral practices of the departmental seniority system and the posting and bidding procedure carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination." 494 F.2d at 236. After reviewing the relevant authorities, we ordered specific affirmative relief. *See* subsection III(A)(3) *supra*.

[22] The recent Supreme Court decision in *United States v. International Brotherhood of Teamsters*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), casts doubt upon the validity of our prior mandate insofar as it required plantwide seniority to be calculated from the date of employment with ACIPCO. *See also United Airlines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). In *Teamsters* the Supreme Court admitted that under the rationale of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.

Ed.2d 158 (1971), a seniority system, not justified by business necessity, whose operation served to freeze the status quo of prior discriminatory employment practices, "would seem" to be unlawful. 97 S.Ct. at 1862. Nevertheless, the Court concluded that such a system would be legally valid under section 703(h) of Title VII,[36] 42 U.S.C. § 2000e-2(h), if it were a bona fide seniority system within the meaning of that section. That is to say, a bona fide system is not itself illegal merely because it perpetuates the effects of pre-Act or post-Act discrimination. 97 S.Ct. at 1843 n.30. See *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 351-53 (5th Cir. 1977), for a discussion of the criteria for determining whether a seniority system is bona fide under *Teamsters*.

[23] The Court's determination that such seniority systems are not intrinsically illegal was not meant to insulate all such systems from modifications necessary to accord relief for past discrimination. With regard to relief, the Court differentiated between pre- and post-Act discriminatory practices, holding that

> [p]ost-Act discriminatees . . . may obtain full "make whole" relief, including retroactive seniority . . . without attacking the legality of the seniority system as applied to them.

97 S.Ct. at 1860. As we elaborated in *James v. Stockham Valves & Fittings Co., supra*, after considering the effect of *Teamsters* on the district court's decree:

> Seniority relief is mandatory in this case even if the district court finds the system bona fide. *See Teamseers*, 431

[36] Section 703(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race. . .

> U.S. at 348, 97 S.Ct. 1843. The federal courts are empowered to fashion such retroactive seniority as the particular circumstances of a case may require to make whole, insofar as possible, the victims of racial discrimination in job assignments, transfers, and promotions.

559 F.2d at 355. Thus, the Court still permits seniority modifications necessary to remedy *other* illegal acts, so long as those other acts are independently actionable. *Teamsters* does, however, limit the scope of permissible relief. With regard to bona fide seniority systems, discrimination after the effective date of Title VII can no longer engender a remedy involving retroactive seniority which antedates the Act. If a seniority system "did not have its genesis in racial discrimination . . . [and] was negotiated and has been maintained free from any illegal purpose", those "employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act." 97 S.Ct. at 1865.

In the case at bar, the plaintiffs filed their complaint with the EEOC on November 22, 1965, attacking both pre-Act and post-Act discrimination. It is clear that the testing and educational requirements which illegally discriminated against black employees remained in effect after the original complaint was filed. 494 F.2d at 219-20, 222-23, 236. The utilization of plant-wide seniority from the effective date of Title VII is necessary to remedy these actionable post-Act discriminatory practices, and therefore is consistent with the *Teamsters* decision. In *Pettway III*, however, we provided plant-wide seniority to all employees from the date of their original employment by ACIPCO. For some employees, this seniority will antedate the effective date of Title VII. If the departmental seniority system in effect at ACIPCO prior to our decision in *Pettway III was bona fide*, this portion of the relief ordered in *Pettway III* would be inconsistent with the Supreme Court's holding in *Teamsters*. If,

on the other hand, the departmental seniority system was not bona fide, it would not be protected under Section 703(h), and our prior substitution of a plant-wide seniority system for the illegally maintained departmental seniority system would be consistent with the *Teamsters* holding.

[24] Appellants urge this court to refrain from reexamining our prior holding in light of *Teamsters*. They correctly argue that under well-settled principles of law, a decision by this court at an earlier stage of the same litigation represents the law of the case. *See Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 402 (1975); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). As such, the earlier decision generally precludes reconsideration of any legal question that has already been decided. We recently observed that

> [t]he "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that . . . it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal thereof.

Carpa, Inc. v. Ward Foods, Inc., supra, at 1319-20, *quoting White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967).

[25] The doctrine, while not a limitation on the court's *power* to reconsider its prior holding, is nevertheless an expression of good sense and wise judicial practice, *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 19, waived "only for the most cogent of reasons and to avoid manifest injustice." *Id.* at 19-20. Perhaps the most cogent reason possible for not

following a previous decision in the same litigation is an intervening decision by the Supreme Court. *Id.* at 19. Indeed, this court has previously reconsidered its prior holdings on a subsequent appeal of the same case when intervening Supreme Court decisions cast doubt on the validity of the original decision. *See Jennings v. Patterson*, 488 F.2d 436, 441 (5th Cir. 1974); *McComb v. Crane*, 174 F.2d 646 (5th Cir. 1949). In *McComb* the judgment appealed from was rendered pursuant to a prior Fifth Circuit opinion holding that the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, did not permit the Administrator to collect wage deficiencies by injunction and civil contempt proceedings. Subsequently, the Supreme Court held that the Administrator could bring civil contempt proceedings. We stated that under the circumstances, "[w]e are compelled to disavow our previous decision as the law of this case and to reverse the judgment appealed from." 174 F.2d at 647.

We find ourselves bound by our decisions in *Jennings v. Patterson* and *McComb v. Crane* and therefore must reconsider the seniority determination in our prior mandate in light of the *Supreme Court's* pronouncements in *Teamsters*. We do so mindful that *Teamsters* is an extraordinary case from the standpoint of *stare decisis*. *See EEOC v. United Air Lines, supra*, 560 F.2d at 235-36. In the words of Justice Marshall's dissent:

> As the Court also concedes, with a touch of understatement, "the view that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support." *Ante*, at 1860, n. 28. Without a single dissent, six courts of appeals have so held in over 30 cases, and two other courts of appeals have indicated their agreement, also without dissent. In an unbroken line of cases, the EEOC has reached the same conclusion. And the overwhelming weight of scholarly opinion is in accord.

97 S.Ct. at 1876 (footnotes omitted). *See also Myers v. Gilman Paper Corp.*, 556 F.2d 758 (5th Cir. 1977) (on petition

for rehearing). We also recognize that this result is inconsistent with the policies of finality in an ongoing lawsuit. As the Second Circuit eloquently stated in affirming the district court's application of *Teamsters* in a somewhat similar procedural setting:

> [W]e are troubled with the result in this case . . . [I]t would seem to make a nullity of judicial determinations valid when they were made, and intended to have permanent effect. Litigation of issues like those raised in the instant case can take years to accomplish—years during which governing precedents can change, sometimes substantially. When such changes occur early in the course of litigation little judicial effort is wasted. But when, as here, changes come after factual determinations have been made, the relevant law has been stated, the majority of relief has been granted, and an appeal has been taken and dismissed by this court, the judicial system is necessarily faced with momentous waste of time and industry if virtual relitigation of the issue is required. In those substantive legal areas in which litigation is necessarily protracted, and legal development swift, the dangers of neverending litigation portrayed so vividly in Dickens' *Bleak House* become an ever-present possibility.

Acha v. Beame, 570 F.2d 57, 64 (2nd Cir. 1978) (No. 77-6119, January 12, 1978) (Slip op. at 1042 n. 8).

Nevertheless, the Supreme Court's decision still discloses the controlling law, which we are bound to apply. In *James v. Stockham Valves & Fittings Co., supra*, we considered for the first time the effect of *Teamsters* on our prior case law and concluded that *post*-Act discriminatees may receive seniority relief under *Teamsters* without attacking the legality of the seniority system as applied to them. Judge Wisdom, writing for the court, underscored the importance of the distinction between pre- and post-Act discriminatees:

> In this case the plaintiffs have proved that Stockham engaged in post-Act discriminatory employment practices in job allocation, testing, craft training and selection, and promotion. Any black injured by these practices is entitled to relief, including retroactive seniority. The issue whether the seniority system at Stockham is bona fide under section 703(h) of Title VII is relevant to this case only if the district court concludes that the class . . . consists of some blacks who suffered only pre-Act discrimination.

559 F.2d at 351. As in *James*, the plaintiffs here have proved that the company maintained illegal testing and educational requirements and subjective selection criteria which relegated black employees to less desirable departments and to lower paying positions in all departments during the post-Act period between 1965 and 1971. They are entitled to relief from the effects of these practices, including retroactive seniority. Moreover, unlike the situation in *James*, there is no question here that every member of the class has been subjected to the illegal post-Act practices. As the class consists only of persons employed as of or subsequent to the effective date of Title VII, no class member suffered *only from* pre-Act discrimination. Every member of the class is a post-Act discriminatee. Thus every class member before us is entitled to seniority relief.

[26] In *Teamsters*, however, the Court restricted the *scope* of permissible seniority relief for post-Act discriminatees operating under bona fide seniority system. The court stated that on remand "no person may be given retroactive seniority to a date earlier than the effective date of the Act." 97 S.Ct. at 1865. A panel of the Seventh Circuit recently concluded that the seniority system at issue was bona fide under *Teamsters* and accordingly modified a district court's plant-wide seniority order by redefining "company seniority" to mean "either total tenure with the company *after* July 2, 1965 (the effective date of the Civil Rights Act of 1964), or total departmental seniority whichever

is greater." *E. E. O. C. v. United Air Lines*, 560 F.2d 224, 234 (7th Cir. 1977). Thus, if the departmental seniority system at ACIPCO is bona fide, plant seniority may not antedate the effective date of Title VII.[37]

The issue of whether the departmental seniority system at ACIPCO is bona fide was not legally relevant when this case originally was tried. Consequently, there have been no factual determinations on this question. On remand the district court should allow the parties to present evidence on the bona fides of the departmental seniority system. In evaluating this evidence, the Court should be guided by our recent decision in *James v. Stockham Valves & Fittings Co., supra*, 559 F.2d at 350-53, which discusses the factors relevant to the court's determination.

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[37] We note here that in our prior opinion we specificaly stated that "[o]ur holdings and the relief directed are granted both under Title VII *and section 1981* unless otherwise stated." 494 F.2d at 217 n. 6 (emphasis supplied). Later we commented that "[d]iscrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. [We then explained the relevance of pre-Act conduct under Title VII.]"
494 F.2d at 218 n. 10.

Appellants maintain that *Teamsters* does not affect our prior holding to the extent that it was grounded in 42 U.S.C. § 1981. Two of our sister circuits have recently split on this issue, the Fourth Circuit holding that bona fide seniority systems which are protected by section 703(h) of Title VII are not violative of section 1981 and the Third Circuit reaching a contrary conclusion that section 703(h) does not affect the remedial powers of the federal courts under section 1981. *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), 46 U.S.L.W. 2610 (May 23, 1978); *Bolden v. Pennsylvania State Police*, — F.2d — (3rd Cir. 1978), 46 U.S.L.W. 2618 (May 23, 1978). Assuming, as we must, that Congress intended section 703(h) to accord absolute protection to pre-Act seniority rights which accrued under bona fide seniority systems, Congress could not have intended such seniority rights to remain subject to revision under section 1981. The same protections should apply whether the seniority system is challenged under Title VII or section 1981. We therefore agree with the Fourth Circuit's holding in *Johnson* that the protection accorded bona fide seniority systems by section 703(h) apply whether suit is brought under Title VII or section 1981.

We add only that the court should consider, in addition to those factors outlined in *James*, whether the departmental seniority rights of ACIPCO's employees arising from employment prior to 1965 vested subsequent to the filing of this lawsuit. A finding that employees' rights under the departmental seniority system did not vest until 1971, as maintained by appellants, would indicate that the seniority system was designed to perpetuate the effects of the company's illegal post-Act practices and thus that the system had its genesis in racial discrimination.

The district court should make detailed findings concerning this factor and each of the criteria outlined in *James*. If, based on these findings, the court concludes that the departmental seniority system was not bona fide, the plant-wide seniority provisions mandated in *Pettway III* should be retained. If the court finds that the departmental seniority system was bona fide, it should modify its decree by redefining "plant seniority" to mean either total tenure with the company after July 2, 1975 or total departmental seniority, whichever is greater. In either case, the remaining requirements for affirmative relief mandated in *Pettway III* retain their validity. We therefore shall proceed with our examination of the injunctive provisions of the decree fashioned below. Throughout our discussion we will refer to the term "plant seniority," although its precise definition must await the outcome of the district court's examination of whether the departmental seniority system in effect in 1971 was bona fide.

C. *Adequacy of the Promotion and Transfer Procedures Adopted Below*

Appellants allege that the promotion and transfer procedures adopted by the district court, *see* subsection III(A)(4) *supra*, are insufficient to guarantee class members their rightful place within the company and do not comport with our mandate in *Pettway III*. To evaluate this contention, we must first determine

whether the district court's order ensures that class members reach their rightful place within the company at the first available opportunity. *See Pettway III, supra,* 494 F.2d at 243. If the procedures adopted by the district court do not fully effectuate this goal, we must then consider whether the impediments to the achievement by class members of their rightful place are justified by business necessity.

1. Rightful Place

To recapitulate briefly our discussion in subsection III(a) *supra,* class members generally are concentrated in the less desirable departments and tend to have relatively low departmental seniority and position within the lines of progression when compared to their plant seniority. In *Pettway III* we found that this phenomenon resulted from ACIPCO's past discriminatory practices and ordered the district court to frame an injunctive decree which utilized plant seniority as a mechanism for ensuring class members the opportunity to reach their rightful place within the company. Although the procedures adopted by the district court improve the opportunities of class members for both intradepartmental promotion and interdepartmental transfer, our careful examination of the record convinces us that the remedy fashioned below falls short of the rightful place goal. With regard to interdepartmental transfer, the new procedures do allow for entry into the new department at a higher level than was formally possible by removing from the former lines of progression some 61 pre-entry level jobs. Consequently, transferees now have the opportunity to enter a new department in a position which is higher up the line of progression than the previous entry level jobs.[38] However, the advantage held by workers

[38] The company argues that the eight "advanced entry" positions, which are posted plantwide with bids based on plant seniority, also provide an opportunity for interdepartmental transfer into advanced positions. These advanced entry positions, however, appear unlikely to benefit class members significantly in the near future. First, only

already in the department over blacks desiring to transfer remains substantially the same. All job vacancies are offered first to employees within the department in the position below the vacancy. Even vacancies in entry level positions are not posted plantwide until workers within the line of progression, or laid-off from it, decline the position. Thus, while lines of progression within the departments have been substituted for departmental pay scale units, the initial preference given to employees within the department remains.

Other deterrents to interdepartmental transfer which we criticized in *Pettway III* are also not entirely eliminated by the court's order. Previously, a black employee was deterred from transferring to a department with greater promotional opportunities because he would lose his accumulated seniority and suffer a cut in pay.[39] Since departmental seniority was the criterion for promotion, a transferee would be unable to compete effectively for future vacancies once he transferred. Under the district court's decree the transferee retains his plant seniority, but seniority is relevant only if a job immediately above the entry position in the line of progression becomes available. The boxing of many jobs in both entry level and advances positions is

eight out of some 230 jobs in the plant are designated as advanced entry positions. Moreover, between 1965 and 1971 six of these jobs never became vacant. More importantly, the prerequisite job experience in other departments will, for the most part, preclude black applicants from bidding on advanced entry positions. For example, qualifications for the "machinist" advanced entry position in the electrical department requires the transferring black worker to have occupied the machinist "A" position in the machine shop. The record indicates that not a single black employee occupies one of over 60 machinist "A" positions. For many of the other seven advanced entry positions, the inability of class members to meet the requisite qualifications renders the advanced transfer opportunity equally illusory.

[39] The red circling remedies in the court's order which were designed to ameliorate the wage deterrent to transfers are discussed in subsection III(D) *infra.*

a positive step, permitting job skipping which substamially reduces the number of steps in each line of progression and accelerates advancement up the line. Nonetheless, the key requisite for promotion is position within the line rather than plant-wide seniority, and an employee desiring to transfer must forfeit his position in the former line of progression and move to what will generally be a lower position in a new line. This loss of position within the line of progression will have a similar effect in deterring transfers as did loss of seniority under the former system.

The district court's plan also fails to rectify fully the effects of past discrimination with regard to intradepartmental promotion. Although departmental seniority is no longer determinative of intradepartmental promotion, the bidding advantage of class members with superior plant seniority is decisive only with respect to white employees at the same level on the line of progression; class members, even if plant senior, may not bid against employees occupying a higher position on the line. The competitive position of class members with relatively high plant seniority is improved by the elimination of departmental seniority as a criterion for promotion, and to the extent that positions in the line of progression open up fairly frequently, the use of plant seniority should greatly accelerate the advancement of these class members. However, under the new system *position* in the line is even more important than plant seniority in determining who may bid on a vacancy, and as we concluded in *Pettway III*, position is precisely what class members lack. 494 F.2d at 218 n.9. The superior position of white employees vis-a-vis blacks is a direct result of the earlier opportunities for whites in the more desirable departments and of the illegal testing and education requirements for promotion. The new promotion system in some respects perpetuates the effect of these discriminatory practices. We have already noted that employees with superior departmental seniority have been able to outbid these class members when even higher

positions in the line become vacant. In some circumstances the new promotion system actually will advantage whites over class members with superior plant *and* departmental seniority. Until May 1975, vacancies were filled by the bidder with the greatest departmental seniority, who also was qualified for the position. While the illegal testing and education requirements were in effect, departmentally junior whites were permitted to advance beyond "unqualified" but senior, blacks. Once the illegal testing and education requirements were lifted, however a black worker theoretically could compete with departmentally junior white workers who had advanced to superior pay group jobs. Now, however, black workers are in an inferior bidding position to these departmentally junior whites who gained superior positions in the line as a result of the testing and education impediments to the advancement of class members.

In sum, past discriminatory practices have allowed many plant junior white employees to gain superior position within the lines of progression vis-a-vis class members. Position has now become the threshold qualification for bidding on vacancies. Thus despite the use of plant seniority to distinguish between bidders on the same level in the line, the requirement that jobs be held in a sequential order in any line of progression tends to "lock in" formerly victimized blacks, thereby perpetuating the effects of past discrimination and prolonging the journey of class members to their rightful place within the company. As we discussed above, the same is also true of the interdepartmental transfer procedure. To justify the new promotion and transfer system, the company thus bears the "heavy burden" of demonstrating that each position in a line of progression provides necessary training for the next higher position. We now turn to the crucial question of whether the new lines of progression are supported by the requisite showing of business necessity.

2. *Business Necessity*

a. *Lines of Progression*

[27] In subsection III(A)(3) *supra* we noted the well-established principle that a promotion and transfer system which impedes the attainment by formerly discriminated-against class members of their rightful place within the company must be justified by business necessity. We have recently had several occasions to reiterate the heavy burden that the law places on a defendant seeking to prove that such structural impediments are essential to goals of plant safety and efficiency. *See, e. g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350 (5th Cir. 1977); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1183 (5th Cir. 1976).

To ensure that the decree framed on remand would effectuate the remedial purposes of Title VII, while at the same time give due regard to the company's interests in efficiency and safety, this court in *Pettway III* instructed the district court as follows:

> The appellants ask that the district court be directed to require that vacancies be posted initially for *plant-wide* bidding and filled by a qualified employee with the greatest *plant-wide seniority*. . . . Under the "rightful place theory" we agree . . . .Therefore, the district court should issue an injunction requiring: (1) posting of vacancies plant-wide; (2) the selection of "qualified" personnel for the vacancies on the basis of *plant-wide* seniority; (3) transferring members of the class shall retain their plant-wide seniority for all purposes including promotion, lay-off reduction-in-force, and recall; (4) advance entry into jobs for which an employee in the class is "qualified" or for which no specific training is necessary; (5) red circling of members of the class: (6) establishment of specific residency periods in lines of progression where the company has established prerequisite training as a "business necessity."

494 F.2d at 248-49 (footnotes omitted) (emphasis in original). The clear import of this instruction was that as a prima facie matter *every* position within the company should be open to plant-wide bidding, with vacancies to be filled by the bidder with the most plant seniority who was "qualified" for the job. Only where the company clearly demonstrated on the record the existence of business necessity for particular prerequisite jobs within a line of progression could bidding be based solely on postion within the line. Even then, however, we required that the line be carefully structured and that advanced entry and job skipping be allowed where requisite experience could be achieved outside the line or in lower level positions within the line itself.

Our examination of the record and the lines of progression fashioned below convinces us that the district court did not follow this mandate. In general, the district judge made only the most perfunctory and conclusory findings to support the injunctive portions of its decree.[40] No new hearings were held and

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[40] We reproduce the district court's findings and conclusions in support of the injunctive portions of its decree in their entirety:
The Court finds and concludes from all the evidence:

(a) That business necessity had been shown and established for the basic principles involved in the line of progression concept used in and governing the structure of the Company's various lines of progression, charts of which are attached as Appendices to the Decree of May 14, 1975 and the Judgment of June 12, 1975;

(b) That business necessity has been shown and established for the Company's revised promotion, transfer, layoff, recall and other employment practices collectively referred to as Seniority Rules and Regulations attached as Appendix B to and approved in the Decree of May 14, 1975;

(c) That the one year waiting period before plant age may be used by a new entrant into a line of progression for promotional purposes is necessarily required to insure a minimum period of training and experience before rising to more responsible positions in the line of progression and thereby avoiding a significant hazard to personnel and equipment

no additional evidence was introduced into the record. Instead, explicit reliance was placed upon a record which this Court had already determined to be wholly inadequate to support a finding of business necessity on most of the issues on remand. Wtih regard to the specific issues of business necessity to support the lines of progression fashioned below, the district court's findings of fact merely states in conclusory terms.

> That business necessity had been shown and established for the basic principles involved in the line of progression concept used in and governing the structure of the Company's various lines of progression . . . [and] for the Company's revised promotion, transfer, layoff, recall and other employer practices . . .

Not only is the record bare of factual support for these findings with regard to lines of progression in many of the departments, but the record indicates that the district court failed to follow our instructions in evaluating business necessity.

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and a substantial adverse effect upon the efficiency of the operation conducted by the line of progression;

(d) That the removal of pre-entry group jobs from the Company's lines of progression and the identification of advanced entry jobs together with the provision for filling vacancies in entry level jobs through plantwide bidding using plant seniority properly and adequately afford promotional and transfer opportunities to eliminate any continuing effect of past discrimination consistent with business necessity of the Company;

(e) That the rate retention provisions set out in paragraph 7 of the Court's Decree of May 14, 1975 properly and adequately encourages and protects the earnings of any black employee who takes opportunity to transfer to a new line of progression in another department from which he may have been inhibited or restricted by the Company's test and educational requirements existing prior to February 18, 1968 but at the same time protects the Company against loss of efficiency and needless waste of training time and cost which would result if black employees occupying and enjoying the pay of the semi-skilled and skilled jobs in pay groups above pay group 8 were encouraged to transfer out of those jobs by unrealistically high rate retention;

(f) That business necessity has been shown and established for the basic principles incorporated in the Company's apprenticeship program and in its on-the-job training program as modified by paragraphs 8 and 9 of the Decree of May 14, 1975;

(g) That business necessity has been shown and established for selecting personnel for promotion to supervisory positions from those incumbents on the one or two top jobs in a line of progression in order to obtain a supervisor with requisite skills and technical knowledge needed to supervise and direct the work under such personnel's supervision and that qualified black employees are being selected for supervisory positions without regard to race, the Company having fourteen black foremen and leadmen as of January 1, 1975 as compared to only two in 1971.

In *Pettway III* we acknowledged that not every class member should not be considered for every position within the company. "In an industry involving sophisticated machining processes such as many of the operations of this company, training of employees for skilled positions is a necessary function for the continued economic life of the business." 494 F.2d at 246. We found, however, that although "[t]he company has evidence in the record that significant portions of its operations require skillfull craftsmenship," "it has failed to demonstrate that every position at the plant is so complex or specialized as to require, without exception, step by step progression within each department." *Id.* More specifically, we concluded after careful examining the trial record that

> The record discloses *no proof* by the company that positions in other than craft or technical lines of progression are functionally related. The plaintiffs themselves admit that craft positions require specific prerequisite training and experience. But we read the district court's findings and the record as providing *no showing* by the company that other lines of progression are functionally related.

494 F.2d at 246-47 (emphasis supplied) (footnote omitted).[41]

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[41] We later reiterated this conclusion:

> [O]nly to those jobs in lines of progression shown by the company to be functionally related does this finding of business necessity attach. The record thus far clearly reveals that only the craft positions are functionally related.

Id. n.96.

[28, 29] Despite this seemingly clear statement that the previous record did not support a conclusion that positions within the non-craft lines of progression were functionally related, Judge Lynne candidly remarked at the October 31 hearing that

> I feel . . . that with the exception of the back pay award . . . I would have entered the [affirmative relief] judgment which I did enter on May the 12th without any evidentiary hearing whatsoever *on the basis of the previous record.*

(A 1168)

That Judge Lynne must have relied on the 1971 trial record to support his finding of business necessity in the non-craft positions is made clear by the total absence of evidence in the record on remand concerning business necessity. This reliance by Judge Lynne on the prior record is in direct contravention of our holding in *Pettway III.*[42]

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[42] The defendant would have this court reconsider its finding that the 1971 trial record discloses no proof that positions in non-craft lines of progression are functionally related. Indeed, the defendant states in its reply brief that

> The record before this Court in the last appeal was quite voluminous and did in fact contain substantial proof of such functional relationship, consisting mostly of unrebutted testimony, which must have been *inadvertently overlooked or misinterpreted by this Court.* (emphasis supplied).

While we readily admit that we are capable of making mistakes, the three examples of trial testimony quoted in the defendant's reply brief which purport to demonstrate the functional relationship of jobs in the non-craft lines fail to convince us that a mistake has been made here. The company first quotes the following testimony from the superintendent of the steel foundry department:

> Q. Mr. McCauley . . . I will ask you to look at the sheet marked Steel Foundry, normal lines of progression. Are you familiar with the lines of progression set out on the chart?
>
> A. Yes.
>
> * * * * * * * *
>
> Q. I will ask you in your experience are those in your opinion, those lines of progression functionally related? (sic)
>
> A. *We think they are very sound.* This is the type thing we have followed for many years and it has served a very good purpose. (A. 905-906) (Emphasis added).

(Footnote 42 Continued on Next Page)

(Footnote 42 Continued)

Next, the following testimony from the Melting Superintendent, Mr. Carlson, is reproduced:

> Q. I will ask you whether or not [the Melting Department LOP's] are functionally related in your opinion?
>
> A. Yes, these would be the normal lines of progression.
>
> Q. Do jobs in the lower pay group furnish experience and training towards the higher rated jobs?
>
> A. Right.

Finally, defendant's reply brief quotes the following colloquy between the court and an ACIPCO Vice President:

> THE COURT: Mr. Coupland, is it your opinion that the lines of progression in which have been followed by American Cast Iron Pipe Company in the past and which are represented by the graph I have seen or the diagrams, is it your opinion they are functionally related to the performance of the plant as a whole?
>
> A. Yes, sir, we think so.

This not so astonishing response by an ACIPCO official and the general conclusory statements by Mr. McCauley and Mr. Carlson simply do not support a finding of business necessity. To paraphrase a recent Eighth Circuit opinion, this testimony does not constitute "evidence that each job was an essential prerequisite to the next higher job in every line of progression. *Some general evidence only* was presented about general structures of lines of progression and their business convenience. But that evidence was not specific enough to meet the test of business necessity." *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir.), *vacated on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975). In *Pettway III* we required that functional relationships to support a finding of business necessity be demonstrated for each position. The testimony quoted above fails to demonstrate such a relationship either position by position, line by line, or verse by verse. Likewise, our examination of those portions of the 1971 trial record cited in the defendant's reply brief reaffirms our conclusion in *Pettway III* that the record is insufficient to support a finding that positions in the non-craft lines of progression are functionally related.

Finally, we note that this appeal is not the proper vehicle for presenting defendant's disagreement with this court's holding in *Pettway III.* Alleged errors in a prior decision are properly raised in petitions for rehearing or by writ of certiorari to the Supreme Court. The "law of the case" doctrine, discussed in subsection III(B) *supra*, precludes reconsideration of decided questions on a subsequent appeal, absent the most cogent reasons such as the avoidance of manifest injustice. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir.), *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). *See also Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978). No such reasons are present here.

We reiterate that evidence adduced at the 1971 trial is insufficient to support a finding of business necessity in the noncraft departments. Neither can this finding be supported by evidence entered on the record subsequent to our remand in *Pettway III*. Indeed, the record on remand is totally devoid of competent evidence of business necessity. The company argues that the court's decree was reached through "informal processes" suggested by this court in *Pettway III* and that a formal trial is not a necessary prerequisite to the entry of the injunctive order. We cannot agree. As we explained in the introduction to this section, the injunctive portions of the decree were entered as the court's own judgment, and as such, must be supported by evidence in the record.

[30] We therefore conclude that Judge Lynne's finding that the lines of progression in the non-craft departments[43] are functionally related based on the doctrine business necessity is unsupported by the record and must be reversed.[44]

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[43] We refer to the monocast, fittings foundry, steel foundry, melting, steel pipe foundry, general yards, central stores, shipping, and construction departments.

[44] Similarly, the one year residency requirement established for the non-craft departments must be reversed. The district court's order provided that departmental seniority, rather than plant seniority, shall be utilized for promotional purposes during the first year of an employee's transwer to a new department. After the expiration of this one year residency period, plant seniority is fully restored. *See* footnote 31 *supra*. The court recognized that this residency period would impede the rise of class members to their rightful place in the company, but found that an across-the-board residency requirement was necessary to familiarize each transferee with his new line of progression and was thus necessitated by business necessity. *See* footnote 40 *supra*. Given our determination that the company has not established a functional relationship between positions in the non-craft lines of progression, a one year loss of plant seniority which impedes progress to the next position in the line of progression cannot be supported by reference to such a relationship. The requirement that bidders for a higher position in the line of progression be "qualified" to fill the vacancy fully protects the company's interest in plant safety and efficiency. We therefore vacate the one year residency requirement for the non-craft departments.

The situation is somewhat different with regard to the craft and technical departments.[45] In *Pettway III* we found that evidence from the 1971 trial supported the conclusion that the lines of progression within these departments were functionally related. 494 F.2d at 246-47. Our examination of that record and the modified lines of progression adopted below convinces us that the district court's finding of business necessity for lines of progression in the craft and technical departments is fully supported by the record. We therefore affirm that portion of the court's injunctive decree.[46]

b. *Transfer Procedures*

[31] We have already determined that the evidence does not support the district court's finding that the lines of progression in non-craft departments are functionally related. It necessarily follows that the evidence does not support the court's finding of business necessity for limiting interdepartmental transfer into the non-craft departments to entry level and advanced entry positions. Where it has not been demonstrated that experience in the entry level positions is necessary for successful performance in the next higher-rated positions, the company may not preclude potential transferees from bidding on the more advanced positions. Accordingly, this portion of the injunctive order must be reversed.

[32] The district court's order also provided that employees within a department shall have an opportunity to bid on vacancies in entry level positions *before* those jobs are posted plant-wide. If a position is designated as entry level, experience

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[45] This category consists of the machine shop, electrical, maintenance, and inspection departments.

[46] Similarly, we find that the one year residency period established in the craft positions is supported in the record by a showing of business necessity and consistent with our mandate in *Pettway III*, see 494 F.2d at 249 and n. 106.

in the line is by definition unnecessary. Under the circumstances, we do not understand how business necessity could possibly justify providing incumbent employees in a department the first opportunity to bid on an entry level vacancy. Therefore, this portion of the decree must also be reversed for both the craft and non-craft departments. The procedures for transfer into craft and technical departments are in all other respects affirmed.

3. Remedy

ACIPCO has now had two opportunities to demonstrate business necessity for lines of progression in the non-craft departments. It has failed both times to satisfy its burden of submitting competent evidence on the record that these lines of progression are functionally related. We cannot allow the vindication of the statutory rights of black employees to await yet another proceeding below and a possible third appeal to this court. The time has come for definite, if preliminary, action. Therefore, we direct that on remand the district court modify its injunction to require that all
vacancies in the non-craft departments be posted plant-wide for bidding based on plant seniority. Vacancies shall be filled by the senior-most bidder who is deemed "qualified" for the position. We reiterate our statement in *Pettway III* that

> "By the term 'qualified' we mean ability which is *not* to be determined solely by reference to experience in the line of progression of a department . . . .."

494 F.2d at 249.[47] On remand the district court should direct

[47] For example, we stated in *Pettway III* that a forklift operator in the mono-cast department should be able to transfer to a forklift operator position in some other department. 494 F.2d at 249. Despite the company's attacks on the "academic character" of this example, we adhere to the position that the company may not preclude advanced entry into lines of progression *solely* because the transferee is unfamiliar with the production process in the line. The company's argument if accepted, would justify *never* allowing advanced entry into *any* line of progression.

the company to devise objective standards for measuring qualifications.[48] Class members who are dissatisfied with a determination by the company that they are unqualified to fill a particular vacancy may submit a complaint through the grievance procedure provided in the May decree.[49]

The decree should also be modified to provide that vacancies in all entry level positions, including those in the craft and technical departments, be posted plant-wide from the outset. Employees working in a line of progression should not be given the first opportunity to bid on such vacancies.

Finally, nothing in this opinion should be construed to mean that the company must place anyone in a job for which he is not qualified. We recognize that some positions in the non-craft departments may be functionally related to other positions in

[48] The court's decree incorporates by reference the company's "Policies, Rules, and Procedures" governing seniority, promotions, and bidding. This policy statement provides that

> Qualifications considered in promotion are:
>
> A. Skill, knowledge, training, and efficiency
>
> B. Physical fitness
>
> C. Length of service
>
> Where factors A and B [are] *relatively equal*, employees with the greatest length of plant continuous service will be given preference.

Insofar as this definition of "qualifications" allows the company to fill vacancies on the basis of comparative skill, knowledge, and training *before* seniority is considered, it is inconsistent with our mandate in *Pettway III*. If accepted, this definition would allow the company in almost every case to place an incumbent in the line because he was *"more* qualified" than a transferee, even though the transferee may be fully qualified and have superior plant seniority. On remand the court must provide that bidding be based initially on plant seniority. The company may then reject the senior-most bidder only if he fails to meet a threshold level of skill, knowledge, and training necessary to perform that job adequately.

[49] The life of the implementation committee, designated by the court to monitor compliance with the May 1975 decree, should be extended for a reasonable time after the district court issues a modified order in compliance with this opinion.

the same line of progression. The provision in the decree that vacancies be given to the senior-most bidder only if he or she is "qualified" should adequately protect the company's interests in safety and efficiency in such situations. While on remand the district court shall first issue a modified injunction requiring plant-wide bidding based on plant-wide seniority for each vacancy in the non-craft departments, the court may, at its discretion, retain jurisdiction and commence further proceedings to give the defendant a final opportunity to prove business necessity for making experience in certain jobs a prerequisite or bidding on other positions in the noncraft lines of progression and for establishing residency periods consistent with our mandate in *Pettway III*. 494 F.2d at 249 and n.106.[50] Where the court concludes that new evidence entered into the record by ACIPCO demonstrates the existence of a functional relationship between positions within a line of progression, it may further modify its injunction. In the event that this occurs, however, the court should make detailed findings, based on the new proceedings, concerning the interrelationship of the positions and the possibility of advanced entry and job skipping. *Watkins v. Scott Paper Co., supra,* 530 F.2d at 1183, *Stevenson v. International Paper Co.,* 516 F.2d 103, 114-15 (5th Cir. 1975).

To reiterate, the district court shall put into immediate effect an injunctive decree providing for plant-wide bidding on vacancies in non-craft lines of progression, limited only by objective qualifications as defined above. Determinations by the company that a class member lacks the requisite qualifications for serving in a particular position must be made on an individual basis and may not be based solely on failure to have served in the line of progression in which the vacancy occurs. Once this system is in effect, the court may, at its discretion, afford the company one final opportunity to demonstrate, by non-conclusory evidence on the record, the existence of particular functional relationships within the non-craft lines of progression. If the court is satisfied that company has met its heavy burden of demonstrating the business necessity of a particular line of progression, it shall make detailed findings to that effect and may make such modifications to the injunctive decree as are justified by the evidence in the record.

[50] ACIPCO has now had two opportunities to show business necessity justifying its proffered lines of progression. Ordinarily, we would be reluctant to provide ACIPCO yet a third opportunity to do so. We recognize, however, that ACIPCO's failure to supplement the record following our remand in *Pettway III* may have been due in part to the unusual nature of the proceedings below. Defendant represents that the district court considered arguments and evidence in chambers which supported its findings of business necessity. We have no way of evaluating this contention or of allocating responsibility for defendant's failure to enter this "evidence" in the record once settlement negotiations broke down. The district court is in a far better position to judge the equities of the situation. Accordingly, we leave the question of whether ACIPCO should be provided a third opportunity to prove business necessity to the discretion of the district court.

D. *Red Circling*

A class member wishing to transfer to a department with greater promotional opportunities might be deterred from doing so if the initial entry position in the new department paid a lower salary than his current job. The red circling remedy allows a transferee to retain his old wage rate until he has had an opportunity to learn the necessary skills to progress in the new department to a salary equal to his old departmental wage rate. *See* footnote 30 *supra.* It thereby eradicates "the obvious impediment of lowered wages to transfer to a new department." *Swint v. Pullman-Standard,* 539 F.2d 77, 11 (5th Cir. 1976). *See Watkins v. Scott Paper Co., supra,* 530 F.2d at 1173-74; *Stevenson v. International Paper Co.,* 516 F.2d 103, 112-13 (5th Cir. 1975). In *Pettway III* we concluded that the red circling remedy was necessary to effectuate the rights of black employees at ACIPCO:

> [w]here a job from which the black employee transfers pays more than the new job in a department where the

> top pay grade is greater than the rate of the old job, a member of the class shall be paid the wage rate of the old job *until he advances to a position paying more than that rate or until he voluntarily freezes himself in at the new job.*

494 F.2d at 249 (emphasis supplied).

[33] The district court's decree on remand provided for red circling. Appellants now argue on appeal that certain limitations placed on the read circling remedy by the district court are inconsistent with the demedial purposes of Title VII and with our mandate in *Pettway III*. We consider these in turn, noting initially that any restriction on the availability of the red circling remedy must be justified by business necessity if it impedes the movement of former discriminatees to their rightful place. *Stevenson v. International Paper Co.*, 516 F.2d 103, 112-13 (5th Cir. 1975).

[34] Appellants first object to the provision in the decree which limits the red circling remedy to class members employed at ACIPCO prior to February 18, 1968, the date that the company eliminated its illegal testing requirements for promotion within the first eight pay groups. The company attempts to justify this provision by arguing that employees hired after that date could not have been harmed by the testing requirements then in effect for pay groups 9 and above. Such requirements were eliminated in March, 1971. As the company points out, the then-current rate progression schedule imposed a six-month residency requirement at each pay group level. Accordingly, no employee hired after February 18, 1968 could have been eligible for a pay group 9 job by March 1971. Appellants respond that the interdepartmental transfer procedures, one source of the discriminatory barrier which red circling was designed to correct, continued at least until the date of the decree. Appellants' argument, however, assumes that the interdepartmental transfer procedures and departmental seniority provisions are themselves illegal. We carefully pointed out in

Pettway III that these procedures should be enjoined, not because they are illegal, but because they "carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination." 494 F.2d at 236. We accept the company's statement that employees hired subsequent to February 18, 1968 could not have been harmed by discriminatory testing or educational requirements. Plaintiffs have not demonstrated on the record that employees hired after that date were discriminatorily placed in the traditionally non-white departments.[51] The record thus supports the conclusion that employees hired after February 18, 1968 were not harmed by discriminatory testing and education requirements for promotions. This portion of the district court's order is therefore affirmed.

Appellants also complain that the district court's decree sets a maximum red circle retention rate equal to the pay group 8 wage rate.[52] The company attempts to justify this limitation by arguing that positions above pay group 8 generally consist of skilled jobs, and transfers into lower-paying jobs in new departments would result in a less efficient utilization of existing skill and training. According to the company, it would be

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[51] Indeed, the statistics relied on in *Pettway III* to support our conclusion that black workers were excluded from higher paying, traditionally white departments by discriminatory practices persisting at least until January 1971 are at best equivocal on the issue of discriminatory *hiring* subsequent to 1968. *See Pettway III, supra,* 494 F.2d at 227 (Chart B), 228-32, 236.

[52] Actually, the decree provides that the retained rate shall not exceed the lower of (1) the standard hourly wage rate in effect for jobs in pay group 8 on the date of the employee's transfer or (2) the standard hourly wage rate of the highest job in the line of progression to which the employee is transferring. This second qualification prevents an employee from abusing the red circling remedy by transferring into a line of progression in which the highest paying job pays less than the employee's present salary. In such a case the employee could have no hope of ultimately improving his wage rate by the transfer, and rate retention, therefore would unfairly penalize the company. This provision is not challenged on appeal.

"unwise" in terms of operating efficiency to encourage movement out of better-paying skilled jobs into unskilled or semi-skilled positions.

[35] While we are sympathetic to the company's position, we cannot ignore the effect of the wage rate limitation on black employees who have reached pay groups 9 and 10 in the limited opportunity departments and now desire to transfer to a higher opportunity promotional unit from which they had previously been excluded by discriminatory practices. In *Watkins v. Scott Paper Co., supra,* we recently invalidated a $3 per hour wage retention limitation. Citing *Pettway III* we stated:

> Neither *Pettway,* nor any other of the red circling cases that have come to our attention, suggests that a limitation on red circling is justifiable. Instead, the cases make clear that red circling is to be complete. Any limitation on red circling requires an affected class member to pay a price for an opportunity provided by Title VII.

530 F.2d at 1174. Therefore, the reduction in wage for those transferees whose present wage rate exceeds the wage retention limitation "constitutes a term or condition of employment that discriminates against the affected class members on the basis of race." *Id.* Full red circle rate retention must be provided where the class is able to show that limitations present a practical impediment to the transfer of *any* affected class member. *Swint v. Pullman-Standard, supra,* 539 F.2d at 100-01, *citing Stevenson v. International Paper Co.,* 516 F.2d 103, 113 (5th Cir. 1975); *Watkins v. Scott Paper Co., supra,* 530 F.2d at 1174. Although the district court, writing without the benefit of our opinion in *Stevenson,* made no findings on this question, as in *Watkins,* "it is inconceivable" here that some affected class members currently earning above the pay group 8 wage rate[53] and now wishing to transfer would not be deterred by the

[53] As of August 15, 1971 there were 41 black employees in pay groups 9-12. *Pettway III, supra,* 494 F.2d at 227 (Chart C).

limitation. 530 F.2d at 1174. Accordingly, on remand the district court's order should be modified to provide full red circle rate retention for eligible class members.

[36] Appellants third contention is that the district court improperly limited the use of red circling rights to transfers made within three years of the decree. We disagree. In *Stevenson v. International Paper Co., supra,* we stated that a

> "time limitation to take advantage of red circling is . . . not *per se* unlawful. This Court has frequently recognized that the employer has an interest in reestablishing stability to his work environment and that *reasonable time limitations* on the extraordinary system created to provide relief for prior discriminatees is permissible."

516 F.2d at 113 (emphasis supplied). Appellants have not demonstrated that the three year limitation is unreasonable or constitutes an abuse of discretion by the district court. However, because of the possibility that some discriminatees have been dissuaded by the invalid portions of the red circling provisions from exercising their transfer rights, on remand the district court should extend the permissible time for exercise of red circle rights for a reasonable period beyond the date on which its modified decree becomes effective. *See Stevenson, supra,* 516 F.2d at 112-113.

[37] Finally, appellants argue that the provisions in the decree which terminate the retained rate where the employee "fails to progress" or "declines to progress" in the new line or where "104 weeks have elapsed since his transfer" are inconsistent with our mandate in *Pettway III* and not justified by business necessity.[54] The company responds that these limitations

[54] The decree also terminates rate retention where the employee progresses in his new line "to a job of equivalent rate to his retained rate" or where, after the first transfer, "he bids to another line of progression or department." These provisions are not challenged on appeal.

are necessary to prevent discriminatees from relaxing their efforts to reach their rightful place by "retiring" to easy jobs at retained pay rates. The 104 week limitation is said to be generally consistent with the period required for advancement to pay group 8 from most entry level jobs.

In *Pettway III* we stated that a transferee "shall be paid" his old wage rate until he advances to a higher paying position or "until he voluntarily freezes himself in at the new job." 494 F.2d at 249 (emphasis supplied). We read the provisions in the decree terminating the retained rate where the discriminatee "fails to progress" or "declines to progress" as consistent with our prior mandate. Appellants' apprehensions that such determinations will be made unfairly by the predominantly white supervisory staff are not compelling in light of the grievance procedure provided by the decree.

The 104 week limitation, however, must be reversed. First, the district court made no findings that this period is sufficient to allow a reasonably diligent and capable employee to advance to pay group 8 from most entry level jobs in most departments. In any event, the company does not point to sufficient evidence in the record to support such a finding. More importantly, the 104 week limitation necessarily was based on the district court's erroneous view that red circle retention could be limited to the pay group 8 wage rate. In light of our holding that full rate retention must be provided even to class members earning above the pay group 8 wage rate, the court on remand must reconsider the length of time following a transfer in which the red circle wage rate must remain in effect. The period adopted must be sufficient to provide a reasonably industrious and capable class member the opportunity to reach his present pay level in the more desirable departments.

We recognize that it may take longer for an employee in, say, pay group 9 to reach this pay level in a new department than for an employee in pay group 5 to reach a pay group 5

position in a new line of progression. The court is free to consider this possibility and apply a different time limitation for each pay level. We also recognize that the same employee may not advance with equal speed in every department. The court need not take account of every possible permutation and combination of transfers which might be available to class members. The court's time limitation, however, must be long enough to allow reasonably diligent and capable class members a fair and reasonable opportunity to reach their present pay group level in the departments from which blacks have traditionally been excluded.

E. *Supervisory Positions*

Prior to 1971 the company's supervisory personnel were selected by department superintendents, all of whom were white. The selection criteria included performance or illegal objective tests and the subjective judgment of the superintendents. The testing was discontinued in 1971. In *Pettway III* we stated that the fact that only one of approximately one hundred supervisory positions was held by a black employee, when considered in conjunction with the use of illegal testing and the application of subjective standards by all-white superintendents, would *normally* present a conclusive showing of present discrimination. 494 F.2d at 240-41. However, because the company had terminated its testing requirements, we remanded the issue for a determination of "whether selection on the basis of subjective judgment of all-white superintendents operates *independently* of the testing to discriminate and helped produce this disparity." *Id.* at 241. We cautioned the court that in examining the evidence it should consider the possibility that a cessation of discriminatory treatment following termination of the illegal testing might indicate, not that the tests were the sole cause of the discriminatory barrier, but that the company had become aware of the possibility of legal sanctions and was building a record for purposes of this lawsuit. Accordingly, we instructed the

court to examine on remand three indicia of discriminatory selection:

> First, as to whether there are more examples of black employees who were able to hurdle the illegal testing barriers to these supervisory positions, but then were disqualified under the subjective criteria utilized by the department superintendents. Secondly, the court should note whether less qualified white employees have been appointed leadmen or foremen both prior to March, 1971 and since that time. Finally, the court should obtain evidence of the operation of this subjective standard applied by white supervisors since the trial.

494 F.2d at 243 (footnotes omitted).

On remand the district court denied plaintiffs' requests for affirmative relief in the area of supervisor selection. The district court's May decree, which provided for injunctive relief, did not mention the factors outlined in *Pettway III*. The November 20 final order stated that business necessity had been shown for selecting supervisory personnel from the incumbents in the one or two highest positions in a line of progression and that qualified blacks were being selected for supervisory positions without regard to race. This later finding was apparently based solely on the fact that the number of black supervisors increased from two to fourteen between 1971 and 1975.[55] There is no indication in the record that the district court considered the

[55] The court in its November 20, 1975 final order concluded:

> That business necessity has been shown and established for selecting personnel for promotion to supervisory positions from those incumbents on the one or two top jobs in the line of progression in order to obtain a supervisor with requisite skills and technical knowledge needed to supervise and direct the work under such personnel's supervision and that qualified black employees are being selected for supervisory positions without regard to race, the Company having fourteen black foremen and leadmen as of January 7, 1975 as compared to only two in 1971.

other factors outlined in *Pettway III* in reaching this conclusion. Mr. Adams' May 23, 1975 motion on behalf of the class for reconsideration of the May 14 decree requested an opportunity to introduce evidence on the supervisory question. This motion was denied by the court on June 12 despite our prior opinion's explicit instruction to take evidence on this issue and despite the lack of any competent evidence in the record apart from the statistics indicating an increase in the number of black supervisors. The court's finding that there are twelve additional blacks in the supervisor positions, while relevant to the ultimate question of whether blacks have been discriminated against by the use of subjective selection criteria, is not determinative of the issue.[56] *See Swint v. Pullman-Standard, supra,* 539 F.2d at 104. Moreover, the court's finding of business necessity for the selection of supervisors from the top positions in the lines of progression is distinct from the question of discriminatory selection of eligible employees from these positions. Under the circumstances, we must again remand for consideration of whether the subjective judgment of all-white superintendents operates to discriminate against black employees. The district court should afford appellants an opportunity to present evidence on the effect of the subjective selection criteria both before and after 1971. As we recognized in *Pettway III*, evidence of past discriminatory selections by white supervisors is highly probative of the potential impact of such procedures in the future. The court should make specific findings of fact regarding each of the indicia of discrimination outlined in *Pettway III*. If, after weighing these factors, the court concludes that the subjective selection procedures operate to discriminate against black applicants, it should order appropriate affirmative relief to remedy the situation. In framing an injunctive order,

[56] Indeed, we have recently commented that "actions taken in the face of litigation are equivocal in purpose, motive and permanence." *James v. Stockham Valves & Fittings Co., supra,* 559 F.2d at 325 n. 18, *quoting Jenkins v. United Gas Corp.,* 400 F.2d 28, 33 (5th Cir. 1968).

the court should be guided by our recent decisions in *James v. Stockham Valves v. Fittings Co., supra,* 559 F.2d at 346-47; *Swint v. Pullman-Standard, supra,* 539 F.2d at 140-5; and *Watkins v. Scott Paper Co., supra,* 530 F.2d at 1193-94.

F. *Reduction in Workforce and Recall Provisions*

[38] Appellants make numerous objections to the reduction in workforce and recall provisions of the decree.[57] First, they argue that the layoff provisions discriminate against senior class members in the lower levels of a line of progression. After carefully considering the record, we conclude that this argument proceeds from an erroneous, although plausible, reading of the court's injunction. The decree provides that reductions in the workforce

> shall be made in descending job sequence order in each line of progression starting with the highest affected job and with the employee on such job having the least length of plant service.

[57] Paragraph 2(a) of the May decree provides that:

> Plant continuous service (hereinafter plant service) shall be used . . . for all purposes in which a measure of continuous service is presently being utilized. . . . [A]ll future promotions, step-ups, demotions, layoffs, recalls and other practices affected by seniority shall be in accordance with plant service provided that, (1) demotions, layoffs, and other reductions in force shall be made in descending job sequence order in each line of progression starting with the highest affected job and with the employee on such job having the least length of plant service, (2) the sequence on a recall shall be made in the reverse order so that the same people shall return to their jobs in the same positions relative to each other that existed prior to the reductions, and (3) where economic conditions necessitate an overall reduction in the plant-wide work force, employees with the lesser plant service shall, subject, however, to the Company's right to retain in its active service such employees with craft, critical job and other specialized skills as may be reasonably required for the continued efficient and safe operation of the Company, be laid off from active service with the Company prior to those employees with greater plant service, and the laid-off employees shall be recalled to active service in the reverse order of their layoff. (A. 63-64).

Appellants read the crucial "descending job sequence order" phrase as allowing a less senior white worker to "bump down" a more senior black employee in a lower level position. This phrase, however, must be read in light of the provision that "layoffs . . . shall be in accordance with plant seniority." *See* footnote 57 *supra.* Thus, in the circumstance of special concern to appellants, if the employee in the highest job subject to a reduction in workforce has lower plant seniority than a black employee in the job level below him, the junior employee, event though starting from a higher position in the line of progression, would be dropped past the black worker and would continue down the line until he reached a level at which he was senior to the incumbent on the job. As so interpreted, this portion of the decree fully protects the interests of class members in reaching their rightful place in the company and is therefore affirmed.

[39] Appellants also argue that the recall procedure devised below is invalid insofar as it gives priority to a less senior white worker, who previously held a now vacant position but was downgraded because of a reduction in workforce, over a more senior black worker who, because of past discrimination, never held the position but is now qualified for it.[58] We agree that the procedure has this effect and that it must be held invalid. As we explained when confronted with a similar recall provision in *United States v. Hayes International Corp.,* 456 F.2d 112, 118 (5th Cir. 1972):

> If an employee in a "B" job is either laid off or remanded to a beginner job, he would be entitled to the "B" job before another beginner even though the other beginner

[58] *See* paragraph 2(a)(2) of the May decree, reproduced in footnote 57 *supra.*

> was also qualified and more senior but had never held the "B" job. . . . These rights appear to be neutral on their face, but have the effect of allowing a residuary disadvantage to these senior Negro employees transferred to lower classifications who are also qualified to perform the higher job in that line of progression.
>
> Qualified Negroes with greater seniority cannot displace incumbent workers. However, they are to be given a preference for future vacant jobs absent a compelling business reason. . . . [T]he only person who would be preferred ahead of a junior experienced employee would be a senior qualified negro transferee. This would not endanger the safe and efficient operation of the plant.

On remand the court's decree should be modified to conform with our holding in *Hayes*, supra.[59]

Appellants raise several other objections to the reduction in workforce and recall provisions of the decree. We have examined these objections and find them to be without merit. This portion of the decree is in all other respects affirmed.

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[59] Paragraph six of the company's "Rules for Upgrading and Changing Wage Rate Jobs," adopted by the court in its May decree, is invalid for similar reasons. This rule provides that

> If a certain high level job is eliminated from a department due to changing business trends or a deep reduction in force in that department and an opening for that job skill occurs in another department, the opening will be filled with the employee with the displaced skill before opening the job for bids, or moving up a less qualified employee in the progression line. Placement of employees with displaced skills will be done with approval of the Seniority Committee.

This provision perpetuates the effects of past discrimination by giving preference for high level jobs to predominantly white employees in similar jobs in other departments over those blacks who could successfully bid on the jobs based on plant seniority and qualifications but for this preference. It has not been justified by business necessity. *See Hayes, supra*, 456 F.2d at 118.

G. *Selection Procedures for Apprenticeship and On-the-Job Training Programs.*

The company's craft positions generally require a high degree of skill and are at or near the top of the wage rate scales. Incumbent employees may train for these positions through apprenticeship and on-the-job training programs operated by the company. In *Pettway III* we reversed as clearly erroneous the district court's finding that the defendant had practiced no invidious racial discrimination in the administration of its apprenticeship and on-the-job training programs. More specifically, we found that the company, as a matter of deliberate policy, totally excluded all black employees from these programs until 1961. From 1961 to 1971 the company continued to restrict black participation in these programs through the use of educational and testing criteria, age requirements, and the requirement that initial consideration for entry into the on-the-job training program be limited to bids from within the craft departments. 494 F.2d at 237-40. We ordered the court on remand to frame appropriate affirmative relief. 494 F.2d at 236-40, 250-51. Appellants claim on appeal that the district court failed to carry out our mandate in framing its injunctive decree. We therefore must examine the district court's order to determine whether it effectuates our prior mandate with regard to these programs.

1. Apprenticeship Program

At the time of our decision in *Pettway III*, applicants for the apprenticeship program were required to be 25 years of age or under. This age requirement was relaxed by four years for those having served in the military. Applicants were not restricted by department; an employee in any department could apply for any apprenticeship position. Once selected for an apprenticeship, the trainee was required to complete a three and one-half to four year course, during which time he would

progress from a group 2 or 3 pay rate to the higher rate of groups 11 or 12. On completing the apprenticeship and being placed in a craft position, the employee would be paid at the rate of pay group 12 or 13.

In *Pettway III* we concluded that the existing age requirement for the apprenticeship program perpetuated the effects of the discriminatory testing and education requirements discontinued in 1971. Class members who previously had been excluded from the program by the illegal testing and education requirements were subsequently excluded by the age requirement. We therefore directed the district court to enjoin the continued use of the age requirement and to substitute the limit of thirty-five years endorsed by the plaintiffs' expert, unless the company could establish business necessity for a different age limitation. We also held that the length of the apprenticeship period was unnecessarily long and that the company had made no showing that this training period was required by business necessity. We ordered that the length of the program be shortened unless business necessity was demonstrated. 494 F.2d at 250.

On remand the district court increased the maximum age limit for the apprenticeship program to thirty-five for class members who reached twenty-six years of age between July 2, 1965 and April 1, 1971, the date on which illegal testing and educational requirements were abolished. Employees covered by this provision were given four months to indicate an interest in being considered for a specific apprenticeship opening. The court also concluded that "the basic principles incorporated in the Company's apprenticeship program" were justified by business necessity and declined to reduce the length of the apprenticeship period.

[40] Appellants vigorously object to the age limitation on applicants to the apprentice program imposed by the district court. Under the court's order class members between the

ages of twenty-six and thirty-five may apply to the program only if they reached the age of twenty-six *before* the illegal testing and education requirements were eliminated; class members who turned twenty-six after April 1, 1971 are not eligible for the apprenticeship program under the district court's decree. Thus, the extension of the age limit would not benefit a class member who entered the company at age eighteen and reached the age of twenty-six on April 3, 1971, two days *after* the illegal qualifications were eliminated. While it is theoretically true that this hypothetical class member was free of the illegal testing and educational requirements during some period of time in which he was eligible for the program, we are convinced that as a practical matter, this two day period of discrimination-free eligibility would not provide a realistic opportunity for entry into the program. The possibility that an apprenticeship position would open during those two days and that the discriminatee would be accepted for that position is simply too remote for us to conclude that this theoretical opportunity suffices to negate the discriminatory effect of the illegal testing and education requirements. A class member in this position is entitled to the full benefit of the relaxation of age-limit qualifications. We therefore hold that the district court's order is inconsistent with the remedial purposes of Title VII and with our mandate in *Pettway III*, which required the use of a thirty-five year age limitation unless business necessity was shown for an alternative age limitation. 494 F.2d at 250. On remand the district court's order should be modified so that the thirty-five year age limitation applies to every employee who was subjected to the illegal testing and education criteria before turning twenty-six years of age.

We recognize that in some instances this rule may provide special benefits to individual class members. For example, a hypothetical employee hired at the age of 18 one year prior to the termination of the illegal requirement would have had seven years of discrimination free eligibility for the apprenticeship

program. Assuming that there is some internal business justification for the twenty-five year age limitation, it appears unfair to the company to provide this employee an additional ten years of eligibility merely because he was subjected to the discriminatory practices for one year. The injustice here, however, cannot justify the limitation adopted below which leaves many members of the class without a complete remedy for past discriminatory practices. In the Title VII context the remedy must be broad enough, consistent with business necessity, to ensure that every dicriminatee is provided opportunities previously denied to him because of past discriminatory practices. *See Pettway III, supra,* 494 F.2d at 247-50, 260-61; *See also James v. Stockham Valves & Fittings Co., supra,* 559 F.2d at 154-56; *Swint v. Pullman-Standard, supra,* 539 F.2d at 99-103. The remedy adopted below clearly fails to accomplish this goal. Our modification is fully consistent with the requirements of business necessity. *See Pettway III, supra,* 494 F.2d at 250. Under the circumstances, we hold that the decree must be revised on remand as indicated above.

[41] Appellants also object to the provision that class members who qualify for the age limitation extension must indicate in writing an interest in being considered for a "specific apprenticeship opening" within four months of the date of the decree in order to remain eligible for an apprenticeship position until reaching the age of thirty-six. We conclude that this portion of the decree places an unnecessary and unjustifiable burden on those class members who are attempting to reach their rightful place in the apprenticeship program. The record indicates that there is a very slow turnover in apprenticeship openings; by requiring potential applicants to make a specific request within four months, the court below has effectively precluded from realistic consideration many class members between the ages of twenty-six and thirty-five. The requirement has not been justified by business necessity. On remand black employees covered by the age limit extension should be allowed

to compete for any vacancies occurring prior to their thirty-sixth birthday.

Finally, we conclude that on remand the court must reconsider the length of the apprenticeship period. In *Pettway III* we stated that "[o]n remand, either by agreement of the parties or order of the court after a hearing, if necessary, the length of the apprenticeship should be shortened with varying periods allowed according to each craft's requirements." 494 F.2d at 250. That no agreement on this issue was reached by the parties is made clear by Mr. Adams' objections to the May decree and by his request for a hearing to establish shorter apprenticeship periods, both of which were overruled by the district court. Under our prior mandate, the district court should have permitted retention of the present apprenticeship period only if the record supported a finding of business necessity. The district court's subsequent finding of business necessity, however, cannot have been based on the record. We stated in *Pettway III* that "[t]he company has made no showing that the three and one-half to four years for apprenticeship . . . are periods required by business necessity," 494 F.2d at 250, and no new testimony or evidence was entered on the record subsequent to our prior opinion.

Under the circumstances, we must conclude that the court's finding of business necessity has no basis in the record. On remand, unless the parties can resolve this issue by agreeement,[60] the court should hold an evidentiary hearing to establish appropriate apprenticeship periods for each craft consistent with our mandate in *Pettway III*.

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[60] The parties, of course, are free to negotiate a settlement on this or any of the issues remaining on remand. We reiterate our comment in the introduction to Section III that any portion of the decree entered on remand which represents the agreement of the parties must be clearly denominated as such. The settlement should be accepted by the court only after Rule 23 procedural requirements have been fully satisfied. *See* subsection V(A) *infra*.

2. On-the Job Training

Eligibility for craft positions in pay groups 12 and 13 can also be acquired through the on-the-job training program. Prior to 1971, illegal testing resulted in the exclusion of blacks from the program. To remedy the effect of the testing equipment, which we found was carried forward by neutral, current practices, we held in *Pettway III* that "the requirement that bids from *within* the craft departments be given initial, primary consideration must fail in light of the proof demonstrating that a large majority of black employees have been excluded from these departments." 494 F.2d at 240 (emphasis in original). We also found that the seven year training period was "unnecessarily long" and not justified on the record by business necessity. We, therefore, ordered the period shortened unless business necessity could be demonstrated. Finally, we stated that "consideration should be given to broadening the qualifying experience on jobs outside craft departments" *Id.* at 250.

On remand the district court ordered that plant seniority, rather than departmental seniority, be utilized in administering the on-the-job training program. The court declined to order further changes in the trainee program, finding that the other contested elements of the program were justified by business necessity. *See* footnote 40 *supra.*

[42] Appellants now allege that the district court failed to follow our prior mandate by continuing to allow the company to give initial preference to bids from within the craft departments. The company responds that the experience necessary to enter the on-the-job training program is only obtainable in positions within these departments. We agree with the company that the record supports the finding that positions within the present lines of progression in the craft departments are functionally related. *See* subsection III(C)(2) *supra.* We are unable to discern from the present record, however, which positions in the lines of progression are *necessary* prerequisites for entry

into the trainee program and thus cannot evaluate the district court's finding that business necessity supports the requirement that bids from within the craft departments be given initial, primary consideration. To the extent that the district court's order gives automatic preference to incumbents of positions in the craft departments which are not necessary to enter the training program, the order is overbroad. On remand, the district court should make detailed findings concerning the operation of the on-the-job training programs and the necessity, if any, of giving preference to bids from particular positions within the department. These findings must be supported by evidence on the record. If the court concludes that preference for positions in the trainee program, as presently constituted, must be given to employees within the department, it must then consider possible modifications of the program itself to ensure compliance with our prior mandate, which required that class members outside the craft departments be given an opportunity to enter craft positions through on-the-job training. 494 F.2d at 250 ("The requirement that bids from *within* the craft departments be given initial, primary consideration must fail . . .") (emphasis in original). The overwhelming majority of black employees traditionally have been excluded from the craft departments. Our validation of the lines of progression within those departments will make it extremely difficult for blacks outside the craft areas to obtain high level craft positions in the foreseeable future. This is true even though red circle rate retention will be available. *See* subsection III(D) *supra.* The on-the-job training program constitutes a logical vehicle for expediting the rise of class members to their rightful places within the craft departments, and within the bounds of business necessity, the court on remand must consider any reasonable proposal advanced by plaintiffs to modify the on-the-job training program to allow black employees presently excluded from the craft departments an opportunity to enter the program.

Appellants also argue that the district court ignored our mandate in *Pettway III* that "the length of the on-the-job training

. . . should be shortened" unless the company proved that the seven year training period was required by business necessity. 494 F.2d at 250. We stressed in our prior decision that no such showing existed on the record at that time. *Id.* The court on remand, without any additional evidence before it on the record, nonetheless concluded that the seven year period was necessitated by business necessity. Because this conclusion has no basis in the present record, we are compelled to reverse. On remand the court must reconsider the length of the program in light of today's holding and our prior opinion, 494 F.2d at 250-51. Additional evidence may be considered on the record, but the limits on access to the on-the-job training program must be brought within the strictures of business necessity.

H. *Conclusion*

In summary, the injunctive relief portion of the decree framed below is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. On remand, an interim order should be entered forthwith requiring that all vacancies in the non-craft departments be posted plantwide for bidding based on plant seniority. *See* subsection III(C)(3) *supra.* Where other modifications or revisions in compliance with this opinion can be effected without further evidentiary proceedings, these changes should also be set forth in the interim order.[61] The court should then hold evidentiary hearings as necessary to comply with the remainder of our mandate.[62] At

[61] In subsection III(D) *supra* we required the district court to provide full red circle wage rate retention to all eligible employees. This modification in the red circle provisions of the court's decree is one example of a revision that can be effected without further evidentiary proceedings.

[62] For example, in subsection III(E) *supra*, we ordered the district court to reconsider whether the subjective judgment of all-white superintendents operates to discriminate against black employees in the selection of supervisors. Evidentiary hearings may be necessary to comply with our mandate on this and similar issues.

this point in the proceedings the court may also, in the exercise of its discretion, provide ACIPCO a final opportunity to demonstrate business necessity for the reestablishment of portions of its present lines of progression in the non-craft departments. *See* subsection III(C)(3) *supra.* Following this evidentiary hearing the court should issue a final decree. Provisions in this decree should be accompanied by detailed findings of fact based on evidence in the record. While the court "need not indulge in exegetics, or parse or declaim every fact and each nuance and hypothesis," *Gulf King Shrimp Co. v. Wirtz,* 407 F.2d 508, 516 (5th Cir. 1969), the "findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.,* 520 F.2d 1030, 1034 (5th Cir. 1975). This is particularly important with respect to those determinations which must be supported by a showing of business necessity.

The parties, of course, are free to negotiate a settlement on any or all of the issues remaining on remand. Any issue resolved through the negotiation process must be explicitly and specifically denominated as a settlement. Before accepting any such settlement, the court must ensure that Rule 23 procedural requirements have been fully satisfied.

IV. *Denial of Back Pay to Class Members Hired Subsequent to July 2, 1965: The Definition of the Back Pay Subclass.*

In subsection I(C), *supra,* we determined that the exclusion of 1400 class members from the back pay subclass constituted the district court's own judgment and was not part of any settlement between the parties. The district court found "that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any alleged discriminatory practice" (A

415) and therefore denied these class members back pay. In *Pettway II, supra,* we set out detailed instructions for determining entitlement to back pay. 494 F.2d at 258-263. Whether the substance of those guidelines was observed below is not apparent from the record. Furthermore, we are unable to determine from the record whether the evidence examined by the district court supports its conclusions. Under the circumstances we must vacate the court's denial of back pay to class members hired after July 2, 1965, and remand for further proceedings consistent with this opinion and other controlling authority. If on remand the district court determines that any particular group within the affected class is not entitled to back pay, "it must carefully articulate its findings and conclusions." *United States v. United States Steel Corp.,* 520 F.2d 1043, 1055 (5th Cir. 1975). *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 2373 n. 14, 45 L.Ed.2d 280 (1975).

To aid the district court on remand, we shall briefly summarize the legal requirements for determining entitlement to back pay which we developed in *Pettway III* and subsequent cases. *See, e. g., Swint v. Pullman-Standard,* 539 F.2d 77, 102-03 (5th Cir. 1976); *United States v. United States Steel Corp., supra,* 520 F.2d at 1052-57; *Baxter v. Savannah Sugar Refining Co.,* 495 F.2d 437, 442-45 (5th Cir.), *cert. denied,* 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974).

[43] This court has established a bifurcated approach to back pay determinations in class actions. At Stage I the *class* must demonstrate a prima facie case of employment discrimination. During this stage, it is improper to require any particular discriminatee to prove personal monetary loss. *United States v. United States Steel Corp., supra,* 520 F.2d at 1054-55; *Baxter v. Savannah Sugar Refining Corp., supra,* 495 F.2d at 443. Once the class has proven a prima facie case of discrimination, it is presumptively entitled to move into Stage II, where individual

back pay claims are presented. *Pettway III, supra,* 494 F.2d at 259. The company may rebut this presumption and thereby prevent the class from moving into Stage II. In the instant case, the class proved its prima facie case of discrimination over four years ago, *id.* at 255-59, and on remand from *Pettway III* the district court properly provided the defendant an opportunity to rebut the presumption of entitlement to back pay.

The company's burden in seeking to rebut the presumption created by the class' prior prima facie showing of discrimination is substantial. As we explained in *United States Steel, supra,* the defendant must draw

> into substantial question the group's entitlement to move into Stage II claimant-by-claimant. In all likelihood the defendant's ability to raise substantial doubt about the group's entitlement will occur only rarely. We anticipate that the defendant would have to show convincingly, and with statistically fair exhibits, that a given group of discriminatees outearned, or at least earned as much as, a plant seniority-comparable group of whites during the discriminatory period.

520 F.2d at 1054.

We are unable to discern from the present record whether the company met this burden. The company points to raw statistical information contained in a computer printout of February 20, 1975, which, according to the company, demonstrates that "black and white employees hired since 1965 and of similar years of plant service in the same department have in general progressed to substantially equal higher rates of pay at the same time."[63] However, the record contains no analysis whatsoever

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[63] The printout classifies each company employee by department, and provides the following information: name, employment date, salary as of February 20, 1975, sex, and race. Apparently, only persons currently employed as of February 20, 1975 were included in the printout, and thus the printout provides no information on those class members no longer employed with the company on that date.

of this data. The district court made no specific findings based on the computer printout and did not refer to the printout in explaining its holding. The only reference in the record to any critical examination of this data is found in the stipulation signed by the company's attorney and Mr. Adams which states that the company "made a study of a representative sample of black employees" hired during and after 1965 and determined that these employees enjoyed earnings comparable to similarly situated whites. "[S]uch determination was made known to the Court." We note that Mr. Adams never agreed with the conclusion reached by the company's analysts. It is more than a little troubling that the study itself was not entered into the record. Indeed, the stipulation suggests that the study itself was never presented to the court. The district court's own judgment may not rest on such a flimsy basis.

While we will not intrude on the fact-finder's role of analyzing and tabulating the raw statistics in the first instance, we do pause to note that appellants' arguments regarding the appropriate conclusions to be drawn from the data deserve careful consideration. On remand the district court should analyze on the record the contentions to both parties regarding these statistics, bearing in mind that the burden is on the defendant to show "convincingly and with statistically fair exhibits" that black employees hired after June 1965 have suffered no economic loss as a result of the company's discriminatory practices. *United States Steel Corp., supra,* 520 F.2d at 1054.

The district court on remand should also consider the limited use that the defendant makes of these statistics. Defendant relies on its statistics as a basis for comparisons of black and white employees *in the same department.* Yet in *Pettway III* we stressed that "those members of the class, either currently situated or present prior to March 31, 1971, within the predominantly black departments . . . are eligible for back pay for the period 1965 to 1971 because of the restrictive effect of the discriminatory test-

ing on their intra-department and *inter-department advancement.*" *Pettway III, supra,* 494 F.2d at 258 (emphasis supplied). We also stated that back pay is appropriate even for class members in predominantly white departments because testing limited their advancement once they were within the department and because some "were inhibited by the testing *from transferring to these departments at an earlier time . . .*" *Id.* (emphasis supplied). The company does not even attempt to argue that its comparison of black employees with white employees within the same department refute the prima facie showing found in *Pettway III,* 494 F.2d at 258, of lost departmental transfer opportunities prior to 1971. On remand the company bears the burden of providing "convincing" evidence that no economic loss was caused by these lost departmental transfer opportunities. Finally, the company bears the same burden regarding "those workers in the class [who were] denied supervisory positions or entrance into the apprenticeship and on-the-job training."[64] In *Pettway III* we stated that these class members are also eligible for back pay. *Id.* at 258-59.[65]

Even if the company satisfies its burden of demonstrating that a given group of class members earned as much as white em-

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[64] In considering these groups within the clas, the court is free to create subclasses to aid its determination. *See United States Steel Corp., supra,* 520 F.2d at 1054, 1056.

[65] The company argues that because of its time progression interval requirement for advancement within pay groups 1-8, employees hired after July 1965 could not have suffered economic loss prior to the March 1971 elimination of all testing and educational requirements for promotion to pay groups 9-16 and for admission to apprentice and on-the-job training positions. The company further alleges that many of the 1400 class members who were denied back pay left the company after an insufficient period of service to have suffered any economic loss. The briefs of appellants and the EEOC purport to refute these arguments. Given the present state of the record, consideration of these points is best left to the district court on remand. Our own review on a subsequent appeal would then benefit from the district court's development of the record and articulation of reasons for its conclusions.

ployees with comparable plant seniority, the class, or members of any definable group within the class, may still claim back pay at Stage II

> if the class representative can make a reasonable argument that the exhibit is distorted, or that a significant number of members might have earned even more than their white contemporaries but for the continued effects of discrimination. Positive proof by each member of the group is not necessary at that point. The representative need only raise on behalf of the class a reasonable inference of "cognizable [economic] deprivations to it as a class," *Baxter, supra,* 495 F.2d at 443, "based on racial discrimination by the employer [or union] in the employment relationship." *Johnson v. Goodyear, supra,* 491 F.2d at 1375. This inference justifies the presumption which entitles the group to move into Stage II.

United States Steel Corp., supra, 520 F.2d at 1054-55.[66] In the event that the court in following this mandate again decides that any particular group within the affected class is not entitled to move into Stage II, it must carefully articulate its findings and conclusions. *Id.* at 1055.

If the district court concludes that some or all of these class members are entitled to move to Stage II, it should follow the burden-of-proof rules respecting individual claims set forth in *Pettway III, supra,* 494 F.2d at 259-63; *United States Steel Co., supra,* 520 F.2d at 1055-1057; *Baxter v. Savannah Sugar Refining Corp.,* 495 F.2d 437, 443-45 (5th Cir.), *cert. denied,* 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974) and *Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1379-

[66] We recognize that this "bifurcated approach" might be more appropriately denominated in terms of three more stages. However characterized, Stage I permits an initial presumption of entitlement which the company may rebut and the class may reinforce by evidence.

80 (5th Cir. 1974). In *Pettway III* we stressed that "the *maximum* burden that could be placed on the individual claimant in this case [in Stage II] is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay . . . The burden then shifts to the company to challenge particular class members' entitlement to back pay." 494 F.2d at 259-60 (emphasis in original).[67] Two basic principles must be followed in computing the back pay award: "unrealistic exactitude is not required and uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer." *Id.* at 260-61.[68]

The district court on remand may, of course, consider the class-wide approaches recommended in *Pettway III* and *United States Steel* for managing the "quagmire of hypothetical judgment" imposed by this complicated back pay determination. 494

[67] If Stage II is reached on remand, and the court chooses to proceed on an individual-by-individual basis rather than utilize one of the class-wide approaches suggested in *Pettway III,* 494 F.2d at 261-63, notice to class members explaining this obligation to provide information to the court would be appropriate. *See* Fed.R.Civ.P. 23 (d)(2).

Judge Wisdom's concurring opinion in *Robinson v. Union Carbide Corp.,* 544 F.2d 1258, 1261 (5th Cir. 1977) discusses standards for Rule 23(d)(2) notice in a similar context. The same standards are applicable here. *See id.* at 1265. Such notice is important in this Rule 23(b)(2) class action because class members who do not supply the requested information would be precluded from relief in this action, but would be bound by the judgment and precluded from pursuing individual relief in another suit. *See* subsection V(B)(1) *infra.*

[68] We also stressed in *Pettway III* that "the ingredients of back pay should include more than straight salary. Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay." 494 F.2d at 263.

F.2d at 261-62. However, in allowing the district court to avoid the quagmire associated with the uncertain terrain of individual determinations, we did not in *Pettway III* extend an invitation to abandon the marshes altogether. While the physical and fiscal limitations of the court in granting and supervising relief make the task a difficult one, they must not be allowed to preclude an award of back pay to each and every aggrieved employee.

In conclusion, we express full confidence in the ability of the district court on remand to achieve a result consonant with the important compensatory purposes of back pay and the legal requirements articulated in *Pettway III* and subsequent cases. The court is free to appoint a master to assist with Stage II, and, as always, the parties are free to negotiate a settlement.

V. *The Back Pay Settlement*

Those appellants who were members of the back pay subclass raise numerous objections to the district court's approval of the back pay settlement. Their primary contention is that the district court abused its discretion in approving the settlement in the face of widespread dissent by the class representatives and a large majority of the subclass. Appellants also contend that the district court failed to adhere to the required procedures for passing on a proposed consent decree. Finally, appellants argue that the time limitation imposed by the district court for opting into the settlement unfairly impinged on the awardees' rights to appellate review. They request that if the settlement is invalidated, sub-class members who opted into the settlement be given an opportunity to disaffirm their award and participate in the proceedings on remand. They ask in the alternative that if the settlement approval is affirmed, awardees who opted out of the subclass by not cashing their back pay checks be given the opportunity to reconsider their decision.

A. *Settlement approval*

1. *Scope of Review*

[44] Appellants' objections to the back pay decree raise difficult and provocative questions concerning the use of a settlement in resolving class action disputes. Before proceeding with our examination of appellants' argument, it is appropriate that we outline the rules of law governing the parameters of our review. We have stated many times that conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976); *Pettway III, supra*, 494 F.2d at 258; *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). We have also recognized, however, that the rights and interests of each class member must be considered in assessing the fairness of the proposed compromise. *See Cotton v. Hinton*, 559 F.2d 1326, 1330-32 (5th Cir. 1977).

[45-47] The judgment of the district court in approving a settlement entered into by the plaintiff class will not be overturned absent a showing that the district court abused its discretion in approving the settlement. *Id.* at 1329; *Allegheny-Ludlum Industries, Inc., supra*, 517 F.2d 849-50. But in exercising that discretion the district court must carefully consider certain factors and comply with certain procedural safeguards to ensure that the settlement is in the interests of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression. Our task on appeal is to ensure that the proper procedures were followed below and that the district court did not abuse its discretion in approving the settlement.[69]

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[69] In determining the fairness, adequacy, and reasonableness of a proposed settlement, neither the trial court nor the appellate court on

2. *Objections from the Subclass*

Appellants' primary contention is that the district court abused its discretion in approving the settlement over the objections of the class representatives and a large majority of the subclass. In the instant case all three active class representatives objected to the proposed settlement. The elected members of the Committee for Equal Job Opportunity each objected to the settlement. Even assuming that the figures proffered by the defendant are correct, 511 members of the 841 person subclass formally objected to the settlement by signing the June 20, 1975 objections to the decree and notice of intent to appeal. *See* footnote 3 *supra*. We may assume that a large percentage of these objectors were workers currently employed in 1975, since no notice of the May decree or June judgment was sent to class members who had left the company prior to May 1975. The back pay checks were not mailed until June 27, and for many this constituted the first official notification of the award. Thus the district court should have known that the number of dissenters to the settlement might have been even greater if class members no longer employed by ACIPCO had had the opportunity to object. Indeed, an additional 78 persons who did not originally object to the settlement later voiced their objections by refusing to cash their back pay checks. *See* footnote 3 *supra*. If we treat these 78 subclass members as objectors of whom the

review should reach ultimate conclusions on the issues of fact and law underlying the dispute. *See Cotton v. Hinton, supra,* 559 F.2d at 1330. While the trial court must "undertake an analysis of the facts and law relevant to the proposed compromise, [focusing his inquiry] upon the terms of the settlement," *id.*, compromise is the essence of a settlement, and the settlement need not accord the plaintiff class every benefit that might have been gained after full trial. Because a settlement may compromise the rights and interests of class members, the procedural requirements for approving a settlement and the substantive rules governing the exercise of a trial judge's discretion are of crucial importance.

district court should have been aware, the number of objectors climbs to 589 or 70 percent of the subclass.[70]

[48, 49] The black letter law in this circuit teaches us that in assessing the fairness of a proposed compromise, the number of objectors is a factor to be considered, but a settlement can be fair notwithstanding a large number of class members who

[70] Under the terms of the district court's opt-in opt-out procedure, 52% of the subclass ultimately opted out by refusing to cash their checks. 511 subclass members, or 61% of the subclass, objected to the settlement by signing the June 20 objections. This figure, augmented by the 78 subclass members who opted out by refusing to cash their checks but did not sign the June 20 objections to the decree, results in the 70% figure which we consider the most appropriate measure of subclass disapproval in the peculiar circumstances of this case. *See* footnote 3 *supra*.

We deem it appropriate to consider the 78 subclass members as dissenters whose dissatisfaction with the back pay award should have been considered by the district court for two reasons. First, the district court was aware that a substantial portion of the subclass had not cashed their back pay check at the time of the October 30 hearing, because its November 20 final order extended the deadline for opting into the subclass until December 15, 1975. Equally important, subclass members received no notice that the back pay decree had been reached by settlement or that each subclass member had right to object to the proposed settlement. Such notice is required by Rule 23(e). *See Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). Thus the district court also should have been aware of the possibility that subclass members other than the 511 who signed the June 20 objections might have expressed dissatisfaction with the decree if, as required by Rule 23, they had been given the opportunity to do so.

ACIPCO aserts that the May 21, 1975 letter from the company to all class members then employed by ACIPCO constitutes sufficient Rule 23(e) notice to subclass members of the proposed back pay settlement. The letter, which summarized the May 14 decree, was accompanied by a copy of that decree. The company points to paragraph 15(c) of the May decree, which provides:

> The Court reserves for later determination the question of whether objections and exceptions [to the back pay award] shall be heard and decided by the Court or shall be referred to a Special Master. (A 78)

This sentence, hidden in the middle of a lengthy and complicated decree, does not constitute adequate Rule 23(e) notice. First, the

oppose it. *Cotton v. Hinton, supra,* 559 F.2d at 1331. *See Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied,* 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 803 (3rd Cir.), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974). The trial court is entitled to take account of the judgment of experienced counsel for the parties. *Cotton v. Hinton, supra,* 559 F.2d at 1330.

[50] These rules, however, do not mean that the approval of plaintiffs' counsel will always be determinative or that the number of objectors to the settlement is not a significant consideration. We have already discussed the potential conflict of interest between an attorney and a class. *See* subsection II(B), *supra.* As Judge Friendly aptly noted in *Saylor v. Lindsley,* 456 F.2d 896, 900-01 (2nd Cir. 1972), in a substantial number of class action cases the lawyer may be more prone to settle than the class. While the natural bias toward relatively small settlements and large fee awards in class actions may be controlled to a certain extent by the procedural requirements for district court approval of the settlement proposal, as a practical matter the lawyer's discretion remains great. *See* K. Davis, Class Action: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. of Legal Studies 47, 57-58 (1975).[71] Consequently, in reviewing a proposed settlement the district court should always consider the possibility that an agreement reached by the class attorney is not in the best interests of the class. This is particularly true where, as here, the class attorney settles the case without the participation or consent of the active class members.

[51] We recognize that discretion on the part of the class attorney often is an unavoidable fact of class action life. We noted in our examination of the appealability question that the traditional notion of the "client" deciding important litigation

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May 21 letter was sent only to class members presently employed by ACIPCO. Thus subclass members who had left the company prior to May 21, 1975 did not receive this notice. Furthermore, the fact that the company's letter was accompanied by a copy of the May decree makes clear that no settlement could have been contemplated, since the settlement at issue was embodied only in the subsequent June 12 judgment. It thus is not surprising that the sentence relied on by ACIPCO utterly fails to inform the subclass of their rights to raise objections to the settlement or of the options that are open to them in connection with the settlement approval proceedings. *See Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir. 1975); *Mandujano v. Basic Vegetable Products, Inc., supra,* 541 F.2d 835.

We stress the failure of subclass members to receive notice of any opportunity to object to the settlement because this fact should have influenced the district judge's perception concerning the degree of dissatisfaction within the subclass. The district judge should have realized that many back pay awardees, particularly those no longer employed by ACIPCO on May 21, 1975, lacked realistic opportunity to sign the June 20 objections to the decree because of the company's failure to send adequate notice. Under the circumstances, we deem it appropriate to treat the 78 subclass members who did not sign the June 20 objections but who later refused to cash their back pay checks as having voiced their objections to the court.

We not in passing that even this 70% figure may understate the actual level of dissatisfaction by failing to consider those members of the subclass no longer employed by ACIPCO who received no notification of the appeal and cashed their checks, despite possible dissatisfaction, because they were unaware of any opportunity to voice their dissatisfaction.

[71] Here appellants allege that such a conflict of interest in fact did arise when Mr. Adams negotiated his fee simultaneously with his settlement negotiations. Such a course of action, if it indeed occurred, would weigh heavily against the district court's decision to accept the settlement, particularly in light of the widespread disapproval of the settlement among the class. The record, however, does not indicate that such simultaneous negotiations actually took place. The appellants correctly point out that they attempted to question Mr. Adams during the October 1975 hearing concerning the events leading up to the decree. The trial court refused to allow such questioning. In other circumstances, the trial judge's failure to develop a record or make findings of fact on the question of simultaneous negotiations might require a remand for a factual determination. *See Cotton v. Hinton, supra,* 559 F.2d at 1331; *Mandujano v. Basic Vegetable Products, Inc., supra,* 541 F.2d at 835-36. In light of our resolution of the other back pay issues, however, we need not rely on the presence or absence of such simultaneous negotiations. Accordingly, such a remand is unnecessary.

questions is often problematic in the class action context because of the difficulty in identifying the client. *See* subsection II(B), *supra*. The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of the majority, the attorney's views must be accorded great weight, and the trial judge's decision to ratify the attorney's action will seldom be overturned.

[52, 53] At least in the context of a proposed back pay settlement, however, at some point objections from the class may become so numerous that in a very real sense it can be said that "the class" has not agreed to the proposal, that counsel's perceptions of the best interests of the class are faulty, and that approval of the settlement by the district court constitutes an abuse of discretion. No simple percentages are determinative, of course, and each case must turn on its own facts. While recognizing the difficult task facing the district court in the absence of crisp guidelines and well-articulated standards for review of a settlement in the face of significant dissent from the class, we are firmly convinced that under the peculiar circumstances of this case, approval of the settlement in the face of such widespread dissent evidenced below constituted an abuse of discretion. The district court should not have placed its imprimatur upon this agreement.

[54] One significant factor in our decision is the unanimous disapproval of the back pay settlement by the active named plaintiffs. To be sure, the assent of named plaintiffs is not a prerequisite to the approval of a settlement. *See Flinn v. FMC Corp., supra*, 528 F.2d at 1174 n. 19 (all three class plaintiffs dissented; settlement approval affirmed); *Saylor v. Lindsley*,

supra, 456 F.2d at 899. But where, as here, the class representatives have provided exceptional representation in the past and there is no showing of any conflict of interest, either actual or potential, between the representatives and the class, *see* subsection II(B), *supra*, and where, as here, not a single subclass member has stepped forward to object to the named plaintiffs' representation or prosecution of this appeal, we must accord great weight to the views of the class leadership. *See Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) (Fact that five of nine named plaintiffs opposed the settlement given great significance in holding that settlement approval constituted an abuse of discretion).

We also attach significance to the fact that each elected member of the Committee for Equal Job Opportunity voiced an objestion to the settlement. We noted on the previous appeal that this "intense organization" was formed by a majority of the company's black employees in 1965 and has maintained a continued and vigorous participation in this litigation. 494 F.2d at 233-34 and n. 53.

[55] Of still greater importance to our decision is the opposition of 70% of the subclass to the settlement. We recognize that a settlement can be fair notwithstanding a large number of objectors. *Cotton v. Hinton, supra*, 559 F.2d at 1331. Indeed, in *Cotton v. Hinton*, we affirmed a Title VII settlement approval where a significant percentage of the class objected to the decree.[72] *See* also *Bryan v. Pittsburgh Plate Class Co.*, 494

[72] The class in *Cotton* was composed of all present and former black employees at the defendant's plant. The court's opinion does not indicate what percentage of this class objected to the consent decree. At one point the court noted that counsel for the objectors purported to represent 187 then-employed black employees. 559 F.2d at 1329. Later the Court observed that counsel "purported to represent a class comprised of almost 50% of the active employees at U. S. Pipe." *Id.* at 133. Because the opinion reveals neither the percentage of black among the active employees nor the size of the class, we are unable to arrive at any meaningful percentage figure indicating the degree of class dissatisfaction in that case.

F.2d 799 (3rd Cir. 1974) (approval of back pay settlement affirmed despite objections from 20% of the class). However, the significance of this factor necessarily will vary depending on the issue that is settled and the amount of the opposition. *Cotton v. Hinton* involved a settlement which provided for broad injunctive relief and an unlimited back pay fund to ensure that every injured class member would be adequately compensated. The actual award to each claimant was left for further proceedings.[73] Here, on the other hand, the dispute is over the sufficiency of the total amount of damages awarded to the class, and 70% of the subclass objected. While majority rule is not the test in every case, in the context of determining the total back pay award majority sentiment becomes highly relevant. We stress that this is not a dispute over the *allocation* of a settlement fund, with respect to which the court should not allow a majority, no matter how large, to impose its decision on the minority. In such circumstances, objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of the settlement is not shifted arbitrarily to a small group of class members. Here the dispute centers around the sufficiency of the settlement fund. Each subclass member's interest in the size of this fund is substantially the same and there are no conflicts of interest among definable groups within the subclass. The decision to approve this settlement thus may appropriately be described as an intrinsically "class" decision in which majority sentiments should be given great weight.

When viewed from this perspective, we must conclude that the district court was required to withhold its approval of this agreement. All of the active named plaintiffs, all of the elected representatives on the Committee for Equal Job Opportunity, and 70 percent of the subclass objected to the settlement. Attorney Adams agreed to the award without the apparent consent of any of the active class members or any significant portion of the

[73] We also note that in *Cotton* there was no allegation that the named plaintiffs objected to the settlement.

subclass. If 100 percent of the subclass had objected we could say with complete confidence that "the class" has not settled its claim. At least under the limited circumstances of this case, our confidence is not shaken when the figure is reduced to 70 percent.[74] Where such a large percentage of the class objects there must be something, not necessarily rotten in Denmark, but unfair to the principality consisting of a class as a whole. The district court abused its discretion in approving this back pay agreement.

Our resolve to reverse the district court's approval of the settlement is strengthened by considerations of judicial economy. In *Cotton v. Hinton, supra,* we recently commented that "[i]n these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources." 559 F.2d at 1331. Where the proportion of the class which objects to the settlement approaches 70%, considerations of economy counsel *against* settlement approval. The greater the number of dissatisfied subclass members, the greater the burden placed on the judicial system by subclass members who opt-out of the settlement and pursue their individual claims. After more than 10 years of litigation in this class action, the strain on the judicial system would be reduced by remanding the case for a final resolution of the dispute satisfactory to, or binding upon, the entire subclass, rather than affirming the lower court's approval of a settlement which was opposed by 70% of the subclass and actually rejected by the 52% of the subclass which ultimately opted out of the settlement.

[74] Our use of this 70% figure as the appropriate measure of dissatisfaction with the settlement among the members of the subclass in no way implies that our result would be different if dissent were measured solely in terms of the 61% of the subclass which formally objected to the settlement by signing the June 20 objections to the decree. We leave open the question of whether, under similar circumstances, the objections of 61% of a back pay subclass would be sufficient to invalidate a settlement.

3. *Procedural Claims*

[56] Appellants also raise a number of procedural objections to the settlement approval. They argue that subclass members not employed by the defendant in May 1975 were not given notice of the proposed settlement as required by Rule 23(e),[75] that the dissenters were denied discovery rights, and that the dissenters were denied an opportunity to present adverse claims. In light of our decision to reverse the district court's approval of the back pay settlement, we need not, and do not, decide whether the failure to provide notice to all subclass members as required by Rule 23(e), *see* footnote 75 *supra*, or the denial of discovery to the dissenters constitute independent grounds for reversal.[76] Given the sparse record on appeal in regard to appellants' allegations that they were denied an opportunity to raise fully their objections to the settlement at the October 30 hearing, we decline to address this issue as well. However, because on remand the parties once again may choose to resolve the back pay question through the settlement process, we deem it advisable to add a few general observations concerning the procedure utilized by the district court in approving the settlement.

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[75] Rule 23(e) provides that notice of a "proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[76] We hope that the parties will be able to settle their differences on remand. In their briefs appellants remark that perhaps an agreeable settlement could be worked out if they were given the opportunity to develop the facts through discovery. The district court on remand should consider this possibility for resolving the dispute. Of course, the scope of the discovery to be conducted in each case rests with the sound discretion of the trial judge. *Cotton v. Hinton, supra,* 559 F.2d at 1333.

If the parties are able to reach an agreement on the back pay issue, the district court should provide full Rule 23(e) notice to all subclass members still eligible for back pay whether or not they are presently employed by the defendant. *See, e.g., Mandujano v. Basic Vegetable Products, Inc., supra,* 541 F.2d at 835-36.

[57] The October 30 hearing, at which the objectors were represented, was held months after the back pay settlement was accepted by the court as its June 12, 1975 "Final Judgment". Even if appellants were given a fair opportunity to develop their objections at the October 30 hearing,[77] by this time the back pay checks had already been issued and a large number of subclass members had accepted their award. This procedure does not comport with the requirements of Rule 23. Rule 23(e) requires that the trial judge provide notice of a proposed settlement to the class and extend to any objectors an opportunity to voice their objections *before* the settlement is approved. *Cotton v. Hinton, supra,* 559 F.2d at 1331. The trial court must then "examine the settlement in light of objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response." *Id., citing Mandujano v. Basic Vegetable Products, Inc., supra,* 541 F.2d at 835-36. Here the settlement was approved in the June 12 judgment authorizing the tender of back pay awards to individual subclass members. The hearing to develop objections was held *after the fact*. It could not have been held to consider whether to approve the settlement when approval had already been rendered months earlier. If any of the issues remanded to the district court for further proceedings are resolved through the settlement process, the court must follow strictly the procedures outlined above for evaluating the proposed agreement.

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[77] Appellants maintain that the October 30 hearing was called solely for the purpose of developing a record of the proceedings leading to the entry of the court's final order, and that the issue of objections by the class was not to be considered until a second hearing. This second hearing was cancelled by the court after the October 30 hearing was concluded. We will assume for purposes of this discussion that appellants were given a sufficient opportunity to develop objections at the October 30 hearing, although the record is at best equivocal on this point.

4. *Summary*

In conclusion, the district court's approval of the back pay decree must be reversed. In light of objections from the 70% of the back pay subclass, including all the active class representatives and each member of the Committee on Equal Job Opportunity, we hold that the district court abused its discretion in approving the back pay settlement.

B. *Opt-in, Opt-out Procedures*

Appellants' final argument on appeal is that the time limitations imposed by the district court for opting into the settlement unfairly restricted the awardees' rights to appellate review. Consequently, appellants ask that those awardees who opted into the settlement be given the opportunity to reject their awards and participate in further back pay proceedings on remand. This issue is addressed in subsection V(B)(2) *infra*. In light of our decision to invalidate the settlement reached below, it is unnecessary to reach appellants' alternative contention that if the settlement is upheld, awardees who opted out of the subclass should be given an opportunity on remand to accept their prior award. Nonetheless, as was true with respect to the procedural aspects of the settlement approval, an important issue with regard to those who opted out of the subclass could recur on remand. In the hope of precluding any necessity for another appeal on this issue, we shall briefly examine the consequence to the awardees of opting out of the subclass.

1. *Opting Out of the Subclass*

As we discussed in subsection II(C), *supra*, the district court's November 20 final order provided that the back pay judgment would become null and void as to those subclass members who failed to cash their checks before December 15, 1975. These individuals were relegated to independent lawsuits against the

company to recover back pay damages. Awardees who opted into the settlement by cashing their checks thereby released the company of all liability arising from any Title VII violations occurring on or before May 14, 1975.[78]

We are particularly concerned with the provision in the district court's November 20 final order that those subclass members who failed to opt into the settlement would be deemed to have opted out of this class action altogether for purposes of determining entitlement to back pay and would be relegated to separate lawsuits. *See* discussion in subsection II(C) *supra*. In *Pettway III* we stated that the district court could allow claimants who were dissatisfied with their pro rata share of a class-wide back pay award to "opt out in order to prove that they were entitled to a larger portion." 494 F.2d at 263 n. 154. While this language is possibly subject to more than one interpretation, and we can understand the district court's dilemma

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[78] The June 12, 1975 final judgment provides that

> The Court approves as complying with Section 15-D of the Decree dated May 14, 1975, the Company imprinting on the back of its checks used in paying the back pay awarded by this Judgment the words, "I understand that my endorsement of this check constitutes a release of liability in the form specified in Paragraph 15-D of the Decree dated May 14, 1975," and such endorsement shall for all purposes bind the endorser the same as if the endorser had executed a written release containing the terms and provisions expressly set out in said Paragraph 15-D of the Decree of May 14, 1975.

Paragraph 15-D of the May 14, 1975 decree states

> D. It shall be a condition to the receipt of any back pay that the recipient execute a release, in a form to be approved by the Court, of any claims against or liability of the Company, its officers, directors, agents, employees, successors and assigns, resulting from any violation or alleged violation based on race or color, occurring on or before the date of the entry of this Decree, of any equal employment opportunity laws, ordinances, regulations, or orders, including but not limited to Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000e *et seq.* the Civil Rights Act of 1866, 42 USC § 1981 *et seq.*, and any other applicable federal, state, or local constitutional or statutory provisions, orders or regulations.

in construing our holding, the context of our remarks[79] makes it clear that we intended that dissatisfied claimants be given an opportunity to prove entitlement to a larger individual award *in the same* lawsuit. Indeed, we have recently commented that opting out of the lawsuit altogether after a back pay settlement is not permitted in 23(b)(2) class actions.

Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976). *See also United States v. United States Steel Corp.*, 520 F.2d 1043, 1053 (5th Cir. 1975). In *Sagers* we were faced with an agreement between the named class plaintiff and the defendant which contemplated that unnamed class members not awarded back pay could assert their back pay claims in individual actions. We stated that

> This Court held in *United States v. United States Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1053, et seq., that back pay claims of individuals represented in a class action, must be asserted in that action or be forever barred . . . [U]nnamed class members, *if not afforded monetary relief in later proceedings in this action*, will be forever precluded from asserting such claims.

529 F.2d at 736 (emphasis supplied).

See also Cotton v. Hinton, supra, 559 F.2d at 1333-4, 1338 (Consent decree establishing the right of dissatisfied claimants

[79] Footnote 154 followed our discussion of the use of a comparability formula for determining a gross back pay award for the class. We reproduce the footnote in full:

> In other words, the total award for the entire class would be determined. At that point, individual claims would be calculated on pro rata shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination. Claimants dissatisfied with their portion of the award could be allowed to opt out in order to prove that they were entitled to a larger portion. Cf. Fed.R.Civ.P. 23(d)(2); *Protective Committee v. Anderson*, 390 U.S. 414, 435, n. 17, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

494 F.2d at 263 n. 154.

"to litigate [the] back pay claim in this action under pendent jurisdiction" consistent with *United States Steel Corp., supra.*) Thus on remand if another settlement of the back pay dispute is reached, the district court should provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action.[80]

2. *Rights of Claimants who Opted into the Settlement*

We now reach appellants' contention that those awardees who opted into the settlement be given the opportunity to reject their awards and participate in further back pay proceedings on remand. The court's November 20 order required awardees wishing to opt into the settlement to do so by December 15, 1975 or be deemed to have opted out of the subclass. This created a dilemma for dissatisfied subclass members, who were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic. As we have previously

[80] This requirement is consistent with the policies of Rule 23. When individual claims are asserted in the same action, the class attorney, who is familiar with the facts and the progress of the litigation, will be able to present the claimant's case. If relegated to a new suit, the individual might be unable to obtain counsel to prosecute his action when the amount of individual damages is relatively small. The requirement also conserves judicial resources by ensuring that the same judge who is already familiar with the case will rule on the merits of the individual claim. By obviating the need to bring a new lawsuit, the expense of litigating the new individual claim is reduced. This procedure also commends itself because the individual claim generally will be resolved more quickly. ***But see Pettway III and IV.***

noted, the opportunity to prove individual damages, even in the same lawsuit, often is not a viable substitute to participation in a lawful settlement.

[58] The procedure adopted by the district court, by requiring claimants to choose whether or not to opt into the settlement *before* they could exercise their right to appellate review, unfairly burdened the rights of awardees to appeal the settlement and thereby significantly undermined one of the most important procedural protections associated with the approval of a settlement. We hold that the ability of subclass members to opt into a back pay settlement may not be terminated before a final determination of the propriety of that settlement is made.[81]

Those subclass members who were dissatisfied with their award but who nonetheless cashed their back pay checks were denied the opportunity to appeal before choosing whether or not to opt into the settlement. Accordingly, the 399 subclass members who opted into the subclass must be given the opportunity on remand to reject their awards and participate in further back pay proceedings.[82]

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[81] In *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3rd Cir. 1971), the court read an ambiguous opt-in provision "to mean that disbursement of the settlement fund would await a final judgment which could not be appealed." The court commented that "[a] serious public policy question would be presented if the notice were construed to require a waiver of the right to appeal as a condition to opting in." 453 F.2d at 32.

Consent decrees approved in this circuit have also provided that back pay shall become available to eligible employees only upon exhaustion of all appellate proceedings. *See, e.g., United States v. United States Steel Corp.*, 520 F.2d 1043, 1056-57 (5th Cir. 1975).

[82] We recognize that some or all subclass members might receive a smaller back pay award on remand than their present share of the settlement. The district court is free to consider any reasonable alternative for ensuring that the company is able to collect from awardees who disaffirm their awards the difference between their present award and the amount which may be awarded after further proceedings. For example, awardees could be required to post a bond, in form, substance, and with surety or sureties as required and

If, after further proceedings on remand, the litigants are able to settle their back pay dispute, the period during which awardees may opt into the settlement must remain open at least until the dissenters have had the opportunity to prosecute an appeal. *Ace Heating & Plumbing Co. v. Crane Co. supra.* This is not to say that subclass members may not be given the opportunity to opt into the settlement and receive their award before the district court's final order becomes non-appealable.[83] We do not require individuals who are satisfied with their share of the settlement fund to wait possibly for years until an appeal is completed before receiving their award.[84]

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approved by the court, in order to disaffirm their present award. Of course, each of the 399 awardees who opted into the settlement should be provided notice of their right to disaffirm their award and participate in further back pay proceedings. This notice should fully explain the awardee's rights and the proper procedures for exercising them.

[83] It is, however, within the court's discretion to withhold all payments until a non-appealable order exists. In some situations the defendant may not wish to distribute settlement funds while an appeal is pending. *See United States v. United Steel Corp., supra; Ace Heating & Plumbing Co. v. Crane Co., supra.* Such a provision in the settlement agreement is permissible.

[84] We recognize that where claimants are given the opportunity to opt into a settlement before an appeal can be prosecuted and most of the subclass members choose to do so, the few dissenters who appeal can receive only limited relief even if their appeal succeeds. For example, if 95 members of a 100 member subclass opted into a settlement, the 5 appellants would, as a practical matter, be relegated to individual claims on remand even if they were successful in overturning the settlement on appeal. Where the district court has already provided for the examination of these individual claims through the opt-out device recommended in footnote 154 of *Pettway III*, the few individual dissenters would be well advised to pursue this remedy before considering an appeal, since the probable result of even a successful appeal would be to require such individual determinations in any event. On the other hand, where the district court does not provide an opt-out device for dissenters, even when the number of dissenters is small the right to appeal is essential. An appellate court which determined that the settlement illegally compromised the rights

3. *Conclusion*

On remand the court should reformulate the back pay subclass to include the 442 individuals who declined to accept the back pay tender and any other awardees who disaffirm their award in compliance with the procedures to be established by the district court. A number of options are then open to the court. Appellants in their brief indicate that if provided an opportunity for discovery and hearings to evaluate the adequacy of the settlement, the subclass members might be willing to accept their individual awards. In its discretion the court may wish to permit such discovery. The court might also encourage further settlement negotiations to arrive at a satisfactory subclass award for the remaining claimants. If these procedures prove unsuccessful, the court could compute an appropriate comparability formula as its own judgment or utilize one of the other classwide remedies discussed in *Pettway III*, *supra*, 494 F.2d at 260-63, and *United States Steel Corp.*, *supra*, 520 F.2d at 1055-56, taking care to articulate fully its findings and conclusions in support of the decree. *United States Steel Corp.*, *supra*, 520 F.2d at 1055. As a last resort the court may utilize the individual-by-individual approach discussion in section IV *supra*.[85]

CONCLUSION

Title VII is a vital, though sometimes unwieldy and inefficient, instrument in the long struggle of minority employees

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of the dissenters and was therefore invalid could then remand the case for further proceedings to establish appellants' individual damages.

The situation with regard to the viability of appeal changes dramatically, however, when a sizable portion of the class does not opt into the settlement. In such circumstances, if the back pay settlement is held invalid on appeal, a classwide remedy remains a viable alternative on remand.

[85] These subclass members would be entitled to proceed to Stage II if this alternative were utilized.

for equality of opportunity. This case presents a striking illustration of the limitations of a court, and particularly an appellate court, in resolving satisfactorily the complex and difficult issues that are raised in the Title VII context. The questions before us today have been at once highly technical and disturbingly elusive. They have required an examination of a voluminous and at times impenetrable record and have necessitated an exceedingly length opinion. After twelve years in the courts and scores of pages of appellate consideration, we still cannot say with confidence that the end of this struggle is in sight. The temptation to enforce the compromises and remedial measures framed below and to put an end to this lengthy litigation has not been insubstantial. Nevertheless, it remains this court's task to ensure that the Title VII rights of ACIPCO's minority employees, who have been subjected to the scourge of racial discrimination are vindicated. While we deplore contributing further to the seemingly Methuselean duration of this case, "we would not substitute one hour of justice."[86] May this epoch ring down the curtain on this seemingly seamless epic.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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[86] *J. H. Rutter Manufacturing Co. v. NLRB*, 473 F.2d 223, 243 (5th Cir. 1973).

APPENDIX E

Due Process Clause, Fifth Amendment to United States Constitution, U.S.C.A. Const. Amend. 5; 42 U.S.C.A. §§ 2000e-2(a), 2(h), and 5(g)

Due process clause, Fifth Amendment to United States Constitution, U.S.C.A. Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C.A. § 2000e-2(a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(h)

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an em-

ployer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C.A. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall

require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Supreme Court, U. S.
FILED
DEC 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-766

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,

v.

RUSH PETTWAY, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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December 22, 1978

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IN THE

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OCTOBER TERM, 1978

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AMERICAN CAST IRON PIPE COMPANY,
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On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition for certiorari inadequately describes the procedural and evidentiary posture of the present case. The decision below in the Court of Appeals involved an extraordinary effort by that Court to enforce its mandate of 1974 after the district court failed to implement that mandate on remand. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.

1974).[1] Substantially all of the questions presented by the petition were decided adversely to the petitioner in the 1974 decision of the Court of Appeals, from which there was no review sought in this Court.[2] In this posture the Court of Appeals was primarily exercising its supervisory powers to assure enforcement of the "law of the case" set out in rigorous detail in its 1974 opinion.[3] To understand the unique posture of the present case, a fuller review of the proceedings below than that provided in the petition is required.

The Court of Appeals in its 1974 decision determined that the petitioner utilized a series of illegal practices in the post-Act period which restricted black employees to the lower paying, less desirable jobs and departments. These practices included illegal testing, education requirements, age restrictions in the training programs, and subjective judgments of a predominantly white supervisory staff. To remedy such practices the Court of Appeals

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[1] The 1974 decision of the Court of Appeals is hereafter cited as "*Pettway III*" in accordance with the decision below.

[2] Those questions which were decided in the 1974 decision of the Court below, and which in the 1978 decision only involved the issue of compliance with the prior mandate, appear sequentially in the Company's Petition as Questions 1, 2 and 4. Pet. for Cert. 2-3. Only Question 3, which concerns the invalidation of releases signed by some class members, involves an issue which was first decided in the 1978 decision of the Court of Appeals. The fifth and sixth questions which are "reserved" by the Company in footnote one of its Petition involve issues which were decided in 1974 but which are arguably affected by intervening decisions of this Court.

[3] As to the central question which pervades virtually the entire petition, the business necessity of the lines of progression, the Court of Appeals set out the limits of its review explicitly.

> ... this appeal is not the proper vehicle for presenting defendant's disagreement with the court's holding in *Pettway III*. Alleged errors in a prior decision are properly raised in petitions for rehearing or by writ of certiorari to the Supreme Court. The "law of the case" doctrine... precludes reconsideration of decided questions on a subsequent appeal, absent the most cogent reasons such as the avoidance of manifest injustice. [citations omitted] No such reasons are present here. (App. 137 n. 42).

determined that the promotion and transfer procedures would necessarily have to be restructured because they perpetuated the effects of the post-Act discrimination and impeded black employees movement to their rightful place. The Court examined the business necessity of the line of progression promotion and transfer procedures and found that "[t]he record discloses no proof by the company that positions in other than craft or technical lines of progression are functionally related". *Pettway III*, 294 F.2d at 246-247.

Accordingly, the Court of Appeals directed the District Court to provide the plaintiff class with seniority relief "carefully tailored to assure that no employee would have a right to a job that he could not perform properly." *Pettway III*, 494 F.2d at 247.[4] The Court also determined that back-pay should be awarded in this case but left the method of calculations to the discretion of the District Court in the first instance. *Id.* at 263.

On remand the petitioner submitted to the District Court its proposed Decree to implement the mandate of injunctive and monetary relief. The plaintiff class immediately submitted extensive written objections. The back-pay calculation formula evolved considerably during a period of several months, a period in which the Court of Appeals characterized the trial judge as "negotiating with the class". (A. 91).

The injunctive relief proposed in August, 1974, however, changed very little and the plaintiff class renewed their objections during early 1975 on January 3 and May 9. On May 14, 1975, over the objections of the plaintiff class, without any further evidentiary hearings and on the basis of the 1971 trial record, the District Court entered the petitioner's proposed injunctive relief as its own Decree without any changes except those suggested by petitioner for its own business convenience. (A. 84-86, 136).

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[4] It also provided certain other affirmative relief which is not contested in the Petition and not discussed herein.

The plaintiff class again resubmitted their objections to the District Court which set the motion down for an evidentiary hearing. Before that hearing could be held, however, the District Court entered a negotiated settlement of the back-pay issue without notice or opportunity to object being given to the plaintiff class and overruled all objections. The Final Judgment awarded varying amounts of compensation to any black employee who was hired before the effective date of Title VII, and worked at least one year in the post-Act period.[5]

Over seventy per cent of the back-pay subclass together with a significant number of the class members not awarded any back-pay objected *pro se* to the May 14 Decree and June 12 Final Judgment. (A. 75-76, 172-174). Because there was no evidence in the record to support either the injunctive relief or the back-pay settlement, the District Court conducted a one day hearing some five months after final judgment was entered for the purpose of establishing the course of the proceedings on remand and the evidentiary materials which supported the disposition of the case.

The petitioner introduced at the hearing a "stipulation" executed by its counsel and the former counsel for the class, over the objection of the class itself, which recited the substance of the various conferences in chambers and over the telephone with the District Judge and which had attached to it literally thousands of pages of documents which had been utilized during the proceedings on remand. The District Judge found that the stipulation and its documentary exhibits fully and accurately established the basis of the injunctive relief and the back-pay settlement. The petitioner declined to introduce any further evidence, either by testimony or otherwise. The plaintiff class introduced three preliminary class member witnesses and then

[5] The Court of Appeals found the exclusion of the 1,400 class members hired after July 2, 1965 to be the District Court's own judgment but the calculation of the awards of the back-pay subclass to have been a negotiated settlement, albeit without the consent of the class. (A. 86-92).

was forbidden by the District Court to submit any further evidence.

On November 20, 1975 the District Court entered a Final Order and Modified Judgment which directed that the two-thirds of the back-pay subclass which had rejected their awards either cash their checks by December 15, 1975 or be deemed to have opted out of the case altogether. Subsequently, the District Court entered Judgment setting aside and anulling back-pay awards to 442 members of the back-pay subclass of 841.

On the fourth appeal to the Fifth Circuit the case was again reversed in part and affirmed in part. Specifically the Court of Appeals determined that the District Court injunctive relief, based in large part on a line of progression promotion and transfer procedure very similar to the one directed to be enjoined in 1974, continued to impede class members movement to their rightful place. (A. 128-140). In some of its application, the injunctive relief was even more restrictive than the promotion and transfer procedures directed to be restructured in 1974.[6] (A. 130-131). The Court carefully considered the business necessity of the restrictions on class member's movement to their rightful place and found the record "totally devoid of competent evidence of business necessity" in non-craft positions. (A. 132-138).

Accordingly, the Court of Appeals structured seniority relief which is tailored[7] to insure that no employee will receive a

[6] The Court of Appeals also found certain limitations on the red-circling, residency periods, reduction-in-force, recall and training program remedies to perpetuate the effects of post-Act discriminatory practices and to not be justified by business necessity. (A. 143-149, 152-163).

[7] The Court of Appeals remanded the seniority relief to the District Court for a determination of the *bona fides* of the seniority system under this Court's decision in **Teamsters v. U.S.**, 431 U.S. 324 (1977). The final meaning of the relief structured by the Court of Appeals will not be determined until after the District Court's determination of this issue. (A. 119-127).

position for which he is not qualified to perform.[8] The District Court's approval of the back-pay settlement over the objections of the class was found to be an abuse of discretion and the opt-in, opt-out procedures utilized below were found to be unduly coercive of class member's rights. The settlement was reversed and the class members who executed releases were allowed to participate in further back-pay proceedings after making assurances satisfactory to the District Court that back-pay already received will be reimbursed if a lesser award is granted on remand.

[8] The means utilized by the Court of Appeals to tailor the seniority relief is discussed below in I. C. 2. of the Reasons For Denying the Writ section of this Brief. It primarily consisted of a finding of business necessity for the jobs and residency periods in the craft and technical lines of progression, affirming limitations on red-circle and advanced entry remedies which were attacked below by respondents, and permitting the District Court to allow the petitioner a third opportunity on remand to prove the business necessity of the non-craft LOP's.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE BUSINESS NECESSITY DOCTRINE AND THE REMEDIES IMPOSED ARE WORKABLE AND NOT PREMATURE

A. The Remedies Are Not Premature

Conspicuously absent from the Petition in this case is any denial by the petitioner that it has discriminated against black employees in the ways found by both the District Court and the Court of Appeals.[9] The central contention of the petition concerns the propriety of the remedies mandated in 1974 and reiterated in the decision below regarding the petitioner's promotion and transfer practices.

It is important to note at the outset that the petitioner does not deny that the practices presently utilized impede a black employees movement into jobs that were denied him in the pre-Act period by formal segregation and in the post-Act period by illegal testing, education requirements and subjective judgments of an all white supervisory staff. (A. 128-131). Rather, the petitioner argues that after thirteen years of litigation and four appeals the Court below acted prematurely in allowing black employees any immediate relief from such practices.

The petitioner's argument in this respect entirely misconcieves the meaning of the business necessity doctrine and its role in adjudicating Title VII cases. Once practices have been shown to have a disparate impact, as the promotion and transfer practices were here, the defendant Company is accorded the opportunity to prove that the practices are dictated by business necessity. It is not the burden of the party discriminated against to disprove the business necessity of the Company's practices. Rather, it is the burden of the Company to prove that the discriminatory effects of

[9] See e.g., A. 113-115, 128-132, 139-140 143-162

the practices should be allowed to continue because they are "necessary to safe and efficient job performance". *Dothard v. Rawlinson,* 433 U.S. 322 n. 14.[10]

In this context, the petitioners repeated allegations that the plaintiff class failed to request a trial on remand[11] and should share the blame for the lack of evidence on business necessity completely reverses the burden of proving business necessity. The plaintiff class met its burden of proving the discriminatory impact of the promotion and transfer procedures and the petitioner failed to carry its burden of proving the business necessity at the 1971 trial. The Court of Appeals determined in 1974 that the "record discloses *no proof* by the company that positions in other than craft or technical lines of progression are functionally related." (A. 135). Accordingly, the practices were found violative of the Act and affirmative relief was mandated. *Pettway III,* 494 F.2d at 235-236.

To excuse their failure of proof the petitioner argues that the issue of business necessity of the lines of progression was never raised in the 1971 trial and that they are now denied due process because of that fact. Pet. for Cert. 31. This assertion is obviously inaccurate. The District Court made specific factual findings that the "jobs in the lines of progression as practiced in each department are functionally related, one to the other". *Pettway v. American Cast Iron Pipe Co.,* 7 FEP 1010, 1013, 1019 (N.D. Ala. 1972). The petitioner argued on the basis of this finding in the 1974 and 1978 appeals that business necessity should be found from the record of the 1971 trial. *Pettway III,* 494 F.2d at 245; *Pettway IV,* A. 136 n.42. On remand from the 1974 Court of Appeals mandate, the district court again found the lines of

[10] Contrary to the petitioner's arguments this is the standard utilized below. See, *Pettway III,* 494 F.2d at 246-247 and *Pettway IV* at A. 135-138.

[11] As discussed more fully below, this allegation is completely unsupported by the record. The respondent class did request a trial on remand and the petitioner opposed it.

progression functionally related on the basis of the 1971 trial record. (A 136). Never once, on either appeal or remand, has the petitioner ever argued that the business necessity of the lines of progression was not tried in the 1971 trial.[12]

On remand in 1974, the petitioner chose to unilaterally revise[13] a few aspects of its lines of progression[14] without offering even the barest shred of new evidence to support the business necessity of a single job progression. The petitioner's argument that the 1975 lines of progression are supported by "substantial information" which was before the District Court, but does not appear in the record, is simply not credible.

First, the only discussion of what such considerations might be is contained in the Petition.[15] The petitioner admits, however, that these considerations "have not been subjected to cross-

[12] Even if it had not been tried in 1971, the Court of Appeals certainly put the petitioner on notice in its 1974 mandate that proof of business necessity of the lines of progression would have to be forthcoming. *Pettway* III, 494 F.2d at 247. Due process requires only the opportunity for a hearing. See e.g., *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 612-613 (1974). The petitioner in the present case declined the opportunity on remand. (A. 133-134, 140). Certainly due process does not require endless proceedings when a party consistently fails to carry its burden of proof.

[13] The petitioner revised its lines of progressions on its own and submitted them to the Court in August, 1974. Despite the immediate and continued objections of the plaintiff class, the district court adopted those lines of progressions without any change in the May 14, 1975 Decree.

[14] Contrary to the assertions of the petitioner, there is far less job boxing and interconnecting between jobs at different levels of the 1975 LOP's then there was in the 1971 lines of progressions. There is also no appreciable change in the altitude of the entry level jobs in the 1975 LOP's. Only three out of fourteen departments have any pre-entry level jobs. These three are the predominantly black Monocast, Foundry and Melting departments.

[15] The petitioner never stated what considerations might support the business necessity of the LOP's in the proceedings on remand or in either appeal to the Fifth Circuit. The nine pages of considerations listed in the Petition at pages 21-29 is the first time anything more than generalized,

examination at trial, *considered by the District Court,* or reviewed by the Court of Appeals." Pet. for Cert. 21 (emphasis added). If evidence before the District Court was so plentiful, one must ask why it was not presented in the Petition or the proceedings below.

Secondly, the petitioner introduced as evidence below an *ex parte* "stipulation"[16] which encompassed every document which ever exchanged hands and a summary of every conference and telephone call which occurred after the 1974 remand. Nowhere in thousands of pages introduced as part of the stipulation was there any evidence concerning the business necessity of the lines of progression. In admitting the stipulation into evidence the District Judge stated that it fully and accurately described the proceedings which were had on remand. (A. 85 n.10).

Despite the failure of petitioner's proof and the fact that the plaintiff class does not bear the burden of disproving business necessity, the class repeatedly objected[17] to the proposed promotion and transfer procedures being based on line of progression position. (A. 83, 85, 86).[18] An evidentiary hearing to fully expose the lack of business necessity was also requested by the plaintiff

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conclusory claims of safety and efficiency has ever been produced by the petitioner. Evidence in the record already refutes most of these considerations. The ones not specifically addressed in the record amount to nothing more than "business convenience" rather than necessity.

[16] The purported "stipulation" was signed by the former counsel for the class without prior knowledge by their present counsel or the class representatives and was accepted into evidence over the objections of the class.

[17] Objections were filed by the plaintiff class in August, 1974, January 3, 1975, May 9, 1975, May 23, 1975, June 20, 1975 and August 30, 1975. The objections prior to final judgment on June 12, 1975 were overruled in that judgment without an opportunity for an evidentiary hearing.

[18] The discriminatory effect of the promotion and transfer procedures adopted on remand is summarized by the Court of Appeals in the decision below. (A. 127-131).

class before and after final judgment.[19] The petitioner, however, opposed any evidentiary hearings prior to final judgment and declined to introduce any evidence other than the stipulation already referred to at the hearing after final judgment.[20]

For these reasons, the Court of Appeals was correct in concluding that a third opportunity to prove business necessity was not warranted under the facts of this case. The Court of Appeals thoroughly examined the record of the 1971 trial and the proceedings on remand and found it "totally devoid of competent evidence of business necessity" and on this basis correctly decided that a workable remedy for the violations of the Act could not be delayed any longer.

After the extensive and exhausting proceedings which have been had in this case, it becomes ever more apparent that competent evidence of business necessity does not exist and that the petitioner has utilized the courts to delay its duty under Title VII and to wear thin the prosecution of this action. Having been given two full scale opportunities to prove its point, and seven years having passed in the interim, the petitioner cannot be said to have been denied due process and the Court of Appeals cannot be said to have acted prematurely in devising an immediate remedy.

B. Business Necessity In The Fifth Circuit Is Consistent With Supreme Court Decisions

In its 1974 decision the Court of Appeals found that the promotion and transfer procedures, including the lines of

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[19] On May 26, 1975 the District Judge set down an evidentiary hearing on plaintiffs' objections. The hearing was then cancelled and the objection overruled including the objection to the lack of business necessity for the lines of progression. After new counsel appeared for the class, another hearing was set down by the District Judge but after three preliminary class members testified the hearing was abruptly adjourned and the plaintiffs were denied the opportunity to call any further witnesses. This latter hearing was held five months after final judgment.

[20] The hearing after final judgment was held for the express purpose of developing a record of the evidence and proceedings which had informally exchanged hands prior to final judgment.

progression, carry forward into the present the discriminatory effects of the post-Act testing, education requirements and subjective judgments of a predominantly white supervisory staff and were not job related.[21] Accordingly, affirmative relief was mandated, *Pettway III,* 494 F.2d at 235-236.

In its formulation of the relief to be granted[22], the Court of Appeals left the petitioner free on remand to present "further evidence of positions requiring specific pre-requisite training" so that the seniority relief would be "carefully tailored to assure that no employee would have a right to a job that he could not perform properly". *Id.* at 247.

It is clear from the 1974 decision of the Court of Appeals that it did not leave the issue of liability open for further evidence on remand. The issue of liability was fully adjudicated and only the issue of remedies was remanded with instructions.[23] In the subsequent appeal the Court below considered business necessity only as a concept for adjusting the relative rights and interests of parties in shaping remedial relief.[24]

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[21] Both the District Court and the Court of Appeals utilized the term "functionally related". See, 7 FEP at 1013 and 494 F.2d at 246-247. It is clear from both decisions that the term "functionally related" means nothing more than what this Court has termed "job related". See e.g. *Griggs v. Duke Power,* 401 U.S. 242, 431-432 (1971); *Albermarle Paper Co. v. Moody,* 422 U.S. 405, (1975); *Dothard v. Rawlinson,* 433 U.S. 321, 329-332 (1977).

[22] The posture of the case at the time of the 1974 decision of the Court of Appeals was one where the district court had found discrimination on a number of points but had refused any remedies other than an award of attorney's fees and costs. (A.74)

[23] This is made clear by the structure of the Court of Appeals decision. The provision allowing further evidence of "positions requiring specific prerequisite training" on remand appears in the "Relief" section of the decision under subpart "B" which is entitled "Restructuring and Promotion Procedures".

[24] The consideration of business necessity in *Pettway IV* arose in the following context:

> Appellants allege that the promotion and transfer procedures adopted by the district court are insufficient to guarantee class members their rightful place within the company and do not comport with our mandate in *Pettway III.* To evaluate this contention, we must first determine whether the district court's order ensures that class members reach their rightful place within the company at the first available opportunity. See *Pettway III, supra,* 494 F.2d at 243. If the procedures adopted by the district court do not fully effectuate this goal, we must then consider whether the impediments to the achievement by class members of their rightful place is justified by business necessity. (A. 127-128).

It was only in this context of shaping remedial relief through use of the business necessity doctrine that the issue of business necessity ever arose in the District Court or the Court of Appeals after the 1974 remand. The petitioner in its briefs to the Court of Appeals and in the proceedings on remand in the District Court never raised the issue of business necessity as a defense to liability. The Petition in this Court is the first time that such an assertion has been made.

This Court has increasingly required the lower federal courts to carefully shape the remedies imposed while still affording full "make whole" relief to the victims of illegal practices.[25] The petitioner itself argues for "a special blend of what is necessary, what is fair and what is workable". Pet. for Cert. 33.[26] It is exactly in this way that the Court of Appeals determined in 1974 and 1978 that the "utilization of plantwide seniority from the effective date

[25] It should be remembered in the present case that seniority relief was mandated to remedy various illegal practices and not just the perpetuating effects of the promotion and transfer procedures. Specifically, seniority relief was mandated to remedy the discriminatory effect of the petitioner's testing program, educational requirements, age restrictions in its training programs and the subjective judgments of a predominantly white supervisory staff, all of which had combined with the promotion and transfer procedures to deny the plaintiff class the requisite competitive position in the lines of progression to achieve their rightful place. The utilization of the business necessity concept on remand was allowed by the Court of Appeals not as a defense to liability for the testing program, education requirements, etc. but as a means to shape the seniority relief dictated by all of these discriminatory practices.

[26] Quoting from *Lemmon v. Kurtzman,* 411 U.S. 192, 200 (1973). See also, *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-422 (1975) ("Where racial discrimination is concerned the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'"); *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763-770 (1976)

of Title VII is necessary to remedy these actionable post-Act discriminatory practices", ie., the testing, education requirements and subjective judgments of an all white supervisory staff. (A. 121). It is in the sense of adjusting such seniority relief as a remedy for these other illegal acts that the Court of Appeals utilized the term "business necessity" in allowing further proof by the petitioner on remand. By doing so, the Court of Appeals was directing the District Court to evaluate each practice, to weigh its discriminatory effect against its function in the business and to compare it to alternatives and to proposed remedies in shaping the relief on remand.

The petitioner, however, confuses the Court of Appeals disposition of the promotion and transfer practices. They argue that the Court of Appeals should have evaluated the legality of the promotion and transfer practices *as such* under the three step analytical framework for practices which have a disparate impact on black employees. Pet. for Cert. 39. This would perhaps be true if the Court of Appeals had found the departmental lines of progression to be themselves illegal. The Court of Appeals, however, "carefully pointed out in *Pettway III* that these procedures should be enjoined, not because they are illegal, but because they 'carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination'". (A. 145). In this posture the "business necessity" of the lines of progression arises only as a part of the remedial phase of the lawsuit, rather than as a part of the liability phase as the petitioner argues.

Even if the Court of Appeals had found the promotion and transfer procedures to be themselves illegal, the proper standard for judging job relatedness of the lines of progression was applied. This Court in *Dothard v. Rawlinson, supra,* stated that a "discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Id* at 331 n. 14. The Court of Appeals decision below merely elaborates on the meaning of the word "necessary" by

pointing out that discriminatory practices must "directly foster safety and efficiency of a plant" and be "essential to those goals". (A. 115-116). The practices in the present case were not only not "necessary" in this sense, but there was "no proof" that the jobs in the non-craft lines of progression were even "functionally related". (A. 135-137). Under any standard of job relatedness the complete absence of proof must fail.

The petitioner's argument that the Fifth Circuit standard for business necessity is inconsistent with the job related standard in this Court also confuses the analysis of a disparate impact theory of discrimination with a disparate treatment theory. They argue that *Furnco Construction Co. v. Waters,* U.S. , 57 LEd 2d 957 (1978), requires that "the employer need only 'articulate some nondiscriminatory reason'" for the practice in question. This standard on the face of the decision, however, was applicable to the liability phase of an individual disparate treatment case and not to the remedies stage of a class disparate impact case.[27]

In addition, the Court of Appeals utilization of the business necessity concepts in the remedies phase of a lawsuit should necessarily be adapted to the special inquiry involved in that phase of the proceedings. This Court has noted the broad sweep of the remedial powers of §706 (g) of Title VII once violations of the Act are found. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763-764 (1976); *Albemarle Paper Co., v. Moody,* 424 U.S. 405, 417-421 (1975). The Court of Appeals has exhaustively reviewed the extensive record in this case and measured the remedies imposed against the business necessity of the practices which the petitioner seeks to preserve despite their discriminatory

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[27] The petitioner is also in error to state that the Court of Appeals placed the burden of proving alternative practices on the Company. The decision below merely states that the district court must find "that each position in the line of progression within a department provides necessary training for the next higher job and that there are no acceptable alternatives for accomplishing the company's safety and efficiency goals". (A.116) The Court did not elaborate whose burden the proof of alternatives would be.

effects. This was a proper use of the business necessity concept in attempting to shape relief to the competing needs of the litigants and the nature of the violations found.

C. The Remedies Are Necessary, Fair and Workable

1. Threshold Qualifications

As a part of the remedial relief structured by the decision below the petitioner was instructed to develop objective standards for measuring "qualifications". (A. 141) When a class member still in the process of moving to his "rightful place" bids on a job and is the senior bidder, he is not to be rejected in favor of a junior white employee unless he does not possess the "threshold level of skill, knowledge and training necessary to perform the job adequately". (A.141).

To attack this provision of the relief the petitioner continues to mix apples and oranges. They argue that this remedy makes the promotion of employees on the basis of relative qualifications "illegal under the Act". Pet. for Cert. 36. This is clearly not what was done. The Court of Appeals did not find the use of relative qualifications to be illegal under the Act but merely required as a remedy for other illegal acts that where a class member bids on a job which he should have already received "but for" other discriminatory practices and for which he is qualified he should not be denied that job merely because a junior white employee may be "better qualified."[28]

This type of relief is essential to remedies structured on the "rightful place" theory, as this case was. The Fifth Circuit has rejected the "freedom now" theory of remedies which would allow black employees to bump junior whites out of jobs which "but

[28] The petitioner's reliance on *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973), again mixes the standards for determining liability in an individual disparate treatment case with the standards for determining remedial relief in a class disparate impact case.

for" discriminatory practices the black employee would have received. *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Instead, it has consistently required that black employees be given the next available opportunity to move to their "rightful place". *Pettway III*, 494 F.2d at 243-244. To require black employees to compete for the next available opportunity with junior white employees would be to deny the black employee the position he would already have "but for" the illegal testing and education requirements in favor of a white employee who would not have achieved better qualifications absent that same discrimination.

The petitioner essentially argues for the "status quo" theory of remedies whereby an employer simply ends explicit discriminatory practices and nothing more. *Local 189, United Papermakers and Paperworkers v. United States, supra.* That theory, however, has been uniformly rejected by each of the Circuits and is inconsistent with the broad approach to remedies prescribed by this Court. See e.g. *Albermarle Paper Co., v. Moody, supra.* Black employees should be allowed to move into the next available position which they would have occupied "but for" the illegal practices of the petitioner and for which they possess "the threshold level of skill, knowledge and training necessary to perform the job adequately". (A. 141). Anything less will not "make whole" class members denied their rightful place.

2. Plantwide Seniority

The petitioner argues that the use of plantwide seniority is unworkable at its facility and that the Court of Appeals usurped the power of the District Court in directing its use on remand. The only considerations which it advances in support of its claim that plantwide seniority is unworkable are matters which it admits "have not been subjected to cross examination at trial, considered by the District Court or reviewed by the Court of Appeals". Pet.

for Cert. 21. Such considerations after the long course of litigation in this case should not be accorded any weight.

The Court of Appeals directed in 1974 that the District Court "carefully tailor" the seniority relief on remand "to assure that no employee would have a right to a job that he could not perform properly". *Pettway III,* 494 F.2d at 247. On reviewing the relief accorded by the District Court on remand, the Court of Appeals concluded that remedies essential to moving class members to their rightful place had not been merely "tailored" but abolished altogether. (A. 127-140). Accordingly, it reviewed the extensive record which has accumulated over the years and fashioned remedial relief which is "carefully tailored" to what is necessary, fair and workable in the context of the rightful place approach to remedies.[29]

The remedies structured by the Court of Appeals took into account the considerations of unworkability advanced by the petitioner in this Court by: (1) allowing the use of departmental lines of progression proposed by the Company in the craft and technical departments (A. 139); (2) allowing the use of a one year residency period for all transferees into craft departments and technical departments whereby department senior whites can outbid plant senior blacks during the first year after transfer (A. 139 n. 46); (3) limiting red circling rights to class members hired prior to February 18, 1968[30] (A. 144-145); (4) limiting the use of red circling rights to transfers made within three years after the 1975 Decree (A. 147); (5) not requiring a greater number of "advanced entry" opportunities in the non-craft and craft departments, as argued for by the respondents in Briefs filed

[29] It should be remembered that the "rightful place" theory is itself a compromise from the "freedom now" approach to remedies. It conceptualizes within its very terms a "tailoring" to the competing needs of black employees, incumbent white employees and the Company by not allowing "bumping" of present holders of positions.

[30] This alone will prevent half of the current black workforce from exercising red circle rights.

below; (6) allowing the District Court to provide petitioner a third opportunity to prove business necessity of the non-craft departmental lines of progression (A. 162-163); (7) allowing further hearings on the priority given bids for on-the-job training from within the craft departments (A. 160-151); and (8) requiring that all employees promoted or transferred be qualified for the vacancy they fill. (A. 141).

The considerations of unworkability of the injunctive relief put forward by the petitioner are largely obviated by the "tailoring" of the remedies allowed by the Court of Appeals. The arguments that there will be a decrease in qualified personnel, a loss and dispersion of valuable skills and increased hazard to employee safety cannot be fully answered because it rests on the basic assumption that black employees can never be qualified for the better paying, more skilled jobs. This was an explicit defense of the petitioner to this action in the liability stage of this case and was soundly rejected on the evidence by the Court of Appeals. *Pettway III,* 494 F.2d at 230-231. It now reasserts itself in this Court and should be rejected as the type of bias which Title VII was enacted to prohibit.

II.

THE RESOLUTION OF THE BACK-PAY ISSUE WAS CORRECT

The District Court ordered the distribution of back-pay just fifteen days after final judgment over the objections of 661 class members. The great majority of the back-pay subclass refused to cash their checks[31] and the District Court then entered an Order which directed the class to cash their checks by December 15,

[31] The petitioner's counsel at the hearing of September 5, 1975 stated that approximately one-third of the 841 members of the back-pay subclass had cashed their checks by that date.

1975[32] or be deemed to have opted out of the case. (A. 105-108, 182-188). The Court of Appeals found this procedure unduly coercive on the exercise of rights of class members who opted into the settlement because they "were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back-pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back-pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic".[33] (A. 185). Because of the coercive effect of these procedures the Court of Appeals allowed class members who opted into the settlement to "reject their awards and participate in further back-pay proceedings" on remand.[34] (A. 186).

The petitioner argues that back-pay releases should not be invalidated without proof that they were executed voluntarily and knowingly. Their argument, however, neglects to mention that the back-pay settlement was distributed without any notice

[32] The final appealable order in this case was not issued until November 20, 1975 at which time the June 20 and 23, 1975 Motions for new trials were denied. The time for appeal did not expire until December 20, 1975.

[33] While the District Court allowed resort to independent lawsuits "free of the defense of res judicata or collateral estoppel", it did not waive the jurisdiction requirements of filing a timely charge of discrimination with the Equal Employment Opportunity Commission. See, *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977). The vast majority of individual claims would have been untimely outside the class action.

[34] The Court of Appeals allowed the District Court to structure a means to assure that any subclass member who cashed their back-pay check would relinquish and repay the amount received if it were determined that they should have received a lesser award on remand. (A. 186 n. 82).

or hearing under Federal Rule of Civil Procedure 23 (e). (A. 173 n. 70, 180 n. 76, 181, 101 n. 22). The failure to provide such notice left the plaintiff class without the information essential to a "voluntary and knowing waiver".[35]

The petitioner's reliance on *United States v. Allegheny Ludlum Industries, Inc.,* 517 F.2d 826, 256 (5th Cir. 1975), is misplaced. That case required that all class members be provided "with comprehensive, relevant information about their rights... before any back pay is delivered and before any releases are signed. Such information is calculated to insure that each electing employee settles knowingly and voluntarily, and with an understanding of the manner and extent to which the decrees remedy his or her grievance". *Id.* It was precisely such information which was denied the class and which operated together with the coercive effect of the opt-out, opt-in procedures to deny even the semblance of a voluntary and knowing waiver of rights under the Act. The Court of Appeals was correct not to condone such procedures and to require the petitioner to relinquish the advantage it wrongfully obtained.[36]

[35] While the Court of Appeals did not rest its invalidation of the releases on this ground, it affords a separate basis for this disposition. Without invalidating releases that are submitted to a class absent notice of opportunity to object, defendants would be given an incentive to tender releases arbitrarily and without compliance with Rule 23(e). A complete breach of the requirements of Rule 23(e) should *per se* require invalidation of the settlement and releases given without notice.

[36] Since the petitioner states that its argument concerning the usurping of the District Court's discretion over the back-pay award and the class members' burden to demonstrate that they were victimized by unlawful discrimination is only "reserved" in case its Petition is granted, these arguments are not addressed herein. Pet. for Cert. 2 n. 1, 41-43. It should be noted, however, that nothing in the Court of Appeals decision dictates that the District Court apply any certain standard in determining back-pay on remand. The decision below only requires that if a discernible group of the class is to be barred from consideration for back-pay then that determination have a rational basis supported by competent evidence in the record. (A. 164-169). Contrary to petitioner's argument that the Court of Appeals decision would allow relief for employees who never applied for promotions or transfers and who were not dissuaded from doing so by the illegal practices, the Court below

CONCLUSION

For the foregoing reasons the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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permitted the petitioner to prove the existence of class members not injured by the condemned practices by "statistically fair exhibits" and stated clearly that its concern was limited to assuring "an award of back pay to each and every *aggrieved* employee." (A. 165, 170). The decision below is entirely consistent with *Albermarle Paper Co. v. Moody, supra,* and *Teamsters v. United States, supra.*

SUPREME COURT, U. S.
FILED
JAN 9 1979

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OCTOBER TERM, 1978

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Petitioner,

v.

RUSH PETTWAY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In their opposing brief,[1] respondents assert that "[s]ubstantially all" of the questions presented by the petition "were decided adversely to the petitioner in the 1974 decision of the Court of Appeals, from which there was no review sought in this Court" and specify in their footnote 2 petitioner's questions 1, 2 and 4 as such questions (Opp. Br. 2 & n. 2). As to questions 1 and 2, respondents' assertion is patently false and irresponsible;[2] as to question 4, their

[1]Cited as "Opp. Br."

[2]Question 1 involves the issue of whether the Court of Appeals *in 1978* properly required the District Court on remand to enter the "interim order" abolishing petitioner's promotion and transfer system instituted by the District Court in 1975 (A.1) and substituting an alternate system—without any evidence having been adduced directed to the necessity, fairness, or workability of the alternate system and contrary to the Dis-

assertion ignores the clear conflict between the Court of Appeals' decisions rendered in 1974 and 1978 and numerous intervening decisions of this Court pertaining to business necessity (Pet. at 38-41).

Respondents rely heavily throughout their brief upon the Court of Appeals' statement in its 1974 decision that the "record discloses no proof by the company that positions in other than craft or technical lines of progression are functionally related" (Opp. Br. 3, 8; *see id.* 4, 10, 11). Respondents fail to point out, however, that the District Court found in its 1972 decision that the company's departmental seniority system then under attack was applied neutrally and did not perpetuate past discrimination (Pet. at 6, *citing* 7 FEP Cases at 1013, 1019). Thus, not until the Court of Appeals reversed the latter finding in 1974 did the company face the burden of articulating nondiscriminatory reasons for the seniority system (under this Court's three-step procedure) — or even a burden of demonstrating that the seniority system was justified by business necessity (under the now infirm standard set forth by the Court of Appeals). The functional relatedness of the jobs within the LOP's was never directly in issue until after 1974.[3] The company proved informally to the satisfaction of the District Court's findings that the abolished system is necessary for the safety and efficiency of Petitioner's plant. Furthermore, the alternate system was *never sought by the plaintiffs in the District Court* (Pet. 2-3)—a point not denied by respondents. Question 2 involves the issue of whether the promotion by an employer of its employees on the basis of their relative qualifications, without regard to race, constitutes unlawful discrimination. That issue has never been raised by the plaintiff class or respondents and the Court of Appeals' 1974 opinion contains absolutely no mention or discussion of the issue. The issue arose from the 1978 Court of Appeals' decision without any briefing, trial, or evidence in the record relevant to the same.

In sum, respondents' assertion that questions 1 and 2 were decided in the 1974 Court of Appeals' decision is demonstrably and totally false.

[3]The Court of Appeals in 1974 remanded the issue to the District Court for trial.

trict Court and counsel of record for the plaintiff class in the 1974-75 remand period that the jobs in the LOP sequences were functionally related (Pet. at 30-31); but the Court of Appeals ignored such proof and ordered the entry of relief flatly repugnant to the District Court's findings based upon that proof (Pet. at 20-21). The impression sought to be created by respondents, that no proof exists of such functional relatedness, is unfair and totally incorrect. Furthermore, the validity of the LOP-based system *itself* has never been in issue prior to the Court of Appeals' summary abolition of the same in 1978, a fact even respondents have not denied.

In response to petitioner's fourth question, respondents argue at length that the Court of Appeals properly disregarded this Court's three-step procedure (see Pet. at 38-40) en route to the Court of Appeals' summary abolition of petitioner's promotion and transfer system and substitution of its own, because: (1) such three-step procedure is applicable only to the "liability phase" of an "individual disparate treatment case" but not to the "remedies stage" of a "class disparate impact case" (Opp. Br. at 15); (2) the Court of Appeals foreclosed the issue of "liability" in its 1974 decision, leaving only the question of "remedy" to the District Court on remand (*id.* at 12, 14); and (3) the promotion and transfer system mandated by the District Court in 1975 is not "illegal" itself but merely perpetuates past discrimination (*id.* at 14). Respondents' arguments ignore that:

1. The issue of "liability" was not foreclosed by the Fifth Circuit in its 1974 decision. That Court's finding of "liability", in the sense that it required the departmental system to be enjoined, was "tempered" by the company's right to demonstrate that the departmental LOP's were justified by business necessity (A. 115), which the company amply

demonstrated to the District Court on remand. Furthermore, that Court's finding of "liability", in the sense that it held the company's neutral departmental seniority system to be unlawful because it was deemed to perpetuate pre-Act discrimination, was made on a now discredited theory.[4]

2. This Court's three-step procedure has been applied, as it logically should, to both disparate treatment cases and to disparate impact cases, regardless of whether such cases were brought as individual or class actions.[5]

3. This Court's opinions make it clear that its three-step procedure is meant to be applied in cases where District Courts and Courts of Appeal are restructuring business practices — whether such restructuring is accomplished at the liability or remedies stage of a lawsuit.[6] Title VII was never intended to allow courts to ride roughshod over neutral business practices that have evolved over many years in highly competitive markets — and certainly not until there

[4]In May of 1977, this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), rejected the concept that a bona fide, neutral seniority system is illegal merely because it perpetuates the effects of pre-Act or post-Act discrimination, implicitly overruling 14 decisions of the Fifth Circuit to the contrary. 431 U.S. at 379 n. 2 (opinion of Marshall, J., dissenting). The Court of Appeals in the decision below, while criticizing *Teamsters* (A. 123-124), recognized the controlling effect of *Teamsters* in this case and remanded the issue of whether the company's seniority system was bona fide under *Teamsters* to the District Court for trial (A. 126).

[5]*Disparate treatment cases: Furnco Construction Corp. v. Waters*, ... U.S. ....., 57 L.Ed. 2d 957, 968 (1978) (individual action); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-805 (1973) (individual action). *See Board of Trustees of Keene State College v. Sweeney*, ... U.S. ....., 47 U.S.L.W. 3330 (No. 77-1792, November 14, 1978) (individual action). *Disparate impact cases: Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (class action); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (individual action).

[6]*Furnco*, 57 L.Ed. 2d at 968; *Albemarle*, 422 U.S. at 425. *Cf., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976) ("Petitioners do not ask for modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire").

is clear proof on the record that alternative practices exist that would equally serve the employer's "legitimate interest in 'efficient and trustworthy workmanship' ". *Albemarle*, 422 U.S. at 425, *quoting McDonnell Douglas*, 411 U.S. at 804-805. Surely neutral practices should be more entitled to the protections afforded by the three-step procedure than practices deemed to be discriminatory.

4. In any event, regardless of which standard is applied by the Court of Appeals, absolutely no evidence has been adduced to show either that the District Court's promotion and transfer system instituted in 1975 is insufficient, discriminatory or unworkable, or that the Court of Appeals' substituted system is sufficient, nondiscriminatory or workable.

Respondents try to create the impression that the injunctive relief entered below was devised by petitioner unilaterally and was essentially no different from and was "even more restrictive" than the departmental seniority system ordered to be enjoined in 1974 (Opp. Br. 3, 5, 9 & n. 14). Having arrived belatedly in the post-judgment stage of this lawsuit, counsel for respondents obviously cannot appreciate the rigorous procedure in which the injunctive relief was hammered out *trilaterally* by counsel for both parties and by the District Court (Pet. 7-8),[7] nor can he appreciate the sweeping, extensive nature of the changes made by the District Court's injunctive relief (Pet. at 8-9; *see* A. 1-46; 116-118).[8]

[7]Counsel of record for the plaintiff class, Adams, Baker & Clemon, and associate counsel Jack Greenberg, et al, of the NAACP Legal Defense Fund—who have litigated this case since 1965—are far from being push-overs as respondents' counsel suggests.

[8]Respondents erroneously assert that there is far less job boxing and interconnecting in the 1975 LOP's and no appreciable change in the "altitude" of entry level jobs in the 1975 LOP's (Opp. Br. 9 n. 14). Extensive job boxing and interconnecting was accomplished by the District Court and numerous jobs which formerly were entry level jobs were

Respondents' statement that "petitioner argues that the use of plantwide seniority is unworkable at its facility" (Opp. Br. at 17) is surprising and obviously inaccurate. Plantwide seniority was awarded by the District Court in its 1975 Decree which has been in effect for more than three years and from which petitioner took no appeal. What petitioner adamantly contends to be unworkable is the promotion and transfer system summarily imposed by the Court of Appeals in lieu of the District Court's system which was summarily abolished by the Court of Appeals.

Respondents' assertion that petitioner argues for the "status quo" theory of remedies (Opp. Br. at 17) is simply absurd. The District Court's injunctive relief is the embodiment of the "rightful place" doctrine, having been *modeled after* decrees approved by the Fifth Circuit (Pet. at 21 n. 26). Indeed, under decisions of this Court, including *Teamsters*, respondents may be entitled to *less* relief than afforded by the District Court (A. 126).

Although not denying the importance of petitioner's question 3 in employment litigation or the clear conflict between the decision below and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (see Pet. at 36-38), respondents attempt to argue on the merits that the releases were not knowingly and voluntarily executed due to the asserted lack of notice under Rule 23(e) (Opp. Br. 21). Petitioner has consistently maintained that Rule 23(e) was not applicable to the instant case because petitioner did not consent to the judgments or decrees entered by the District Court, but even if Rule 23(e) is deemed applicable, then petitioner strongly maintains that: (1) all of the safeguards of 23(e) — notice of the judgment and opportunity to object — were present in the instant case; and

removed from the LOP's and designated as "pre-entry base group jobs", thereby elevating substantially the "altitude" of entry-level jobs. Even the Court of Appeals stated that the "procedures adopted by the district court improve the opportunities of class members for both intradepartmental promotion and interdepartmental transfer" (A. 128).

(2) the releasors had far more than ample knowledge of the facts necessary to a voluntary and knowing waiver.[9]

In sum, respondents' assertion that the releasors had inadequate information upon which to make a voluntary and knowing waiver is far from the truth. It is hard to imagine a case where releasors were represented, notified, and informed as thoroughly as in the instant case. Under *Gardner-Denver*, the releases should not have been invalidated summarily by the Court of Appeals without any showing by the releasors that the releases were executed involuntarily and unknowingly.

In response to the serious practical problems that would be created by the interim order, described by petitioner at length in the petition (Pet. at 21-29), respondents assert that "[e]vidence in the record already refutes most of these considerations" (Opp. Br. 9, 10 and n. 15). Respondents' assertion is outrageously inaccurate. The unprecedented relief awarded under the interim order was *never sought* by counsel of record for the plaintiff class or by respondents in the District Court. Abolition of petitioner's LOP-based promotion and transfer system likewise has never been

[9] In May, 1975, the May Decree with Appendices A, B and C was mailed in booklet form to all employees of the company accompanied by a letter approved by the District Court summarizing the provisions of the Decree. The Decree itself devoted almost five pages to the calculation of back pay (A. 12-16), notified employees of their right to object to the back pay award (A. 16) and of the release that would be required as a condition to receipt of any back pay (*id.*). Class members had ample opportunities and did object to the proposed judgment—indeed, class members (either pro se or through counsel) filed objections to almost every proposed decree. Furthermore, two hearings were held, attended by large numbers of class members, at which repeated objections to the decrees were made by respondents' counsel through testimony and argument and at the latter hearing, respondents' counsel was provided the right to put on evidence and cross examine company witnesses concerning respondents' objections to the judgments, which latter right respondents' counsel expressly failed to exercise.

The releasors were represented by able counsel, Adams, Baker &

sought — a fact not denied by respondents. No evidence has *ever* been adduced in this case relevant to the wholesale abolition of the LOP-based system or to the practical problems and conceptual infirmities of the interim order that threaten the livelihood of petitioner's business. Respondents' counsel is obviously handicapped by his arrival in this action at the post-judgment, post-trial stage in 1975 (after four appeals and 10 years of litigation). His attempts to mislead this Court are reprehensible.

Respondents do not address, discuss, attempt to resolve, or offer *any solutions whatsoever* to *even one* of the serious problems created by the interim order (Pet. at 21-29). Those problems must be deemed to be valid for purposes of this petition, and the decision below — in the interests of fairness and justice to petitioner and *all* of its employees, including respondents — should be vacated and the District Court's Decree and Judgments affirmed, or at the very least, this case should be remanded for a trial so that those problems can be considered by the District Court based on evidence adduced and consistent with the legal principles enunciated by this Court.

CONCLUSION

In light of (1) the inability of respondents to face the issues presented in the petition without grossly distorting the relevant facts and law; (2) the numerous conflicts between the decision below and relevant decisions of this Court; (3) the gravity of the injustice of the decision below to petitioner and its employees; and (4) respondents' failure to deny the importance and substantiality of the questions presented, the need for plenary review of the action below is indisputable. Petitioner respectfully suggests and prays to the Court that the petition should be granted and:

1. The Decree and Judgments of the District Court should be affirmed summarily.

2. In the alternative, the decision of the Court of Appeals should be vacated summarily to the extent it reversed the Decree and Judgments of the District Court and to the extent it invalidated the releases of claims, and the action should be remanded to the District Court for a trial on the merits of those aspects of the District Court's Decree and Judgments reversed by the Court of Appeals, consistent with the principles set forth in relevant decisions of this Court.

Respectfully submitted,

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Of Counsel

January 8, 1979

Clemon, and associate counsel, Jack Greenberg of the NAACP Defense Fund. Class members were further represented by the "Committee for Equal Job Opportunity, [which] held *monthly meetings* and *distributed news letters* to keep the class informed of the progress of the case" (A. 99) (emphasis added).